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SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

JOE E. FRYAR,

PETITIONER

VERSUS

EDWARD C. ABELL, JR., AND CAREY WALTON, ET AL,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Volume II

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Westside project was less feasible than Fryar had presented, and that Fryar misrepresented key facets of Westside's financial structure. Most significantly, Fryar withheld the details of his land transaction with All American, of All American;'s huge profit when it resold the same land to Westside, and of his $2 million pledge, of which money none came from his own pocket.

The bondholders also developed substantial evidence to support the jury·s conclusion that Westside's rickety financial structure, long hidden by Fryar's financial tricks, caused its ultimate bankruptcy. In that bankruptcy, the court reduced the bond's interest rate by nearly one-third. This is a sufficient showing that Fryar's alleged

RICO violations injured the bondholders' property.

Fryar also contends that RICO requires plaintiffs to prove at least two related predicate acts arising from distinct schemes. See 18 U.S.C. § 1962 (requiring a RICO plaintiff to prove a "pattern of racketeering"). Fryar's brief correctly notes that "[p]laintiffs have fashioned their RICO claim from the matrix of their securities law fraud claims." From this observation, Fryar concludes that the plaintiffs failed to prove the predicate acts necessary to establish a "pattern of racketeering."

Our cases, however, belie Fryar's legal analysis. In R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350 (5th Cir. 1985), we held that RICO requires only that the predicate acts alleged be

related, not that they arise from separate schemes or incidents. Here, plaintiffs have alleged over half a dozen acts of mail fraud and wire fraud, each of which stems from Westside's bond offer. R.A.G.S. requires no more. But see Montesano v. Seafirst Commercial Corp., 818 F.2d 423, 426 (5th Cir. 1987); Crocker v. F.D.I.C., 826 F.2d 347, 348 n. 2 (5th Cir. 1987), cert. denied, __ U.S. __, 108 S.Ct. 1075, 99 L.Ed.2d 235 (1988); Smith v. Ayers, 845 F.2d 1360, 1365-66 n. 18 (5th Cir. 1988). (Each of these cases criticizes R.A.G.S., but notes that only the court sitting en banc or the Supreme Court may overturn R.A.G.S.)[28]

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28. We recently granted a petition for a re-hearing en banc to address this issue Smith v. Cooper/T.Smith Corp., 850 F.2d 1086 (5th Cir. 1988) (vacating panel op. at 846 F.2d 325 (5th Cir. 1988)).

Finally, Fryar argues that plaintiffs failed to prove any of their wire fraud or mail fraud allegations. Fryar reasons that mail fraud and wire fraud, which he assumes incorporate all the elements of fraud, must require plaintiffs to prove materiality and reliance. He asserts that the plaintiffs have failed to establish these two elements.

Materiality and reliance, however, are not elements of either wire fraud or mail fraud. Our cases unmistakably hold that plaintiffs need prove only a defendants' fraudulent intent; the success of a fraudulent scheme is not necessary to establish mail fraud or wire fraud. To prove mail fraud, for example, a plaintiff must prove that

> (1) the defendant participated in some scheme or artifice to defraud, (2) the defendant or someone

> associated with the scheme used the mails or 'caused' the mails to be used, and (3) the use of the mails was for the purpose of executing the scheme.

Armco Indus. Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 481-82 (5th Cir. 1986) (citing United States v. Davis, 752 F.2d 963, 970 (5th Cir. 1985)). A "scheme to defraud" is one "in which artifice or deceit is employed to obtain something of value...." United States v. Kreimer, 609 F.2d 126, 128 (5th Cir. 1980). Thus, plaintiffs prove that Fryar intended to defraud them where they can show that defendant's plan was "reasonably calculated to deceive persons of ordinary prudence and comprehension." United States v. Finney, 714 F.2d 420, 423 (5th Cir. 1983).[29] Under RICO, each

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29. See also United States v. Toney, 605 F.2d 200, 205 (5th Cir. 1979), cert.

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use of the mails to accomplish the same scheme is a separate predicate act. See R.A.G.S.

Here, plaintiffs alleged that Fryar had repeatedly used the mails to execute a scheme to sell Westside bonds with the intent of defrauding the purchasers. The record amply supports the jury's conclusion that Fryar, intending to defraud potential investors, devised and employed a scheme to sell Westside bonds. Fryar knowingly misled prospective bondholders about a land transaction that significantly affected Westside's financial structure. He falsely

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denied, 444 U.S. 1090, 100 S.Ct. 1055, 62 L.Ed.2d 779 (1980); United States v. Netterville, 553 F.2d 903, 909 (5th Cir. 1977), cert. denied, 434 U.S. 861, 98 S.Ct. 189, 54 L.Ed.2d 135 (1977) and 434 U.S. 1009, 98 S.Ct. 719, 54 L.Ed.2d 752 (1978).

suggested that he had backed the health care project with $2,000,000 of his own money. Obviously, the jury could find that Fryar had a reasonably calculated plan to deceive persons of ordinary prudence and comprehension into giving Westside their money.

Nor does Fryar contest whether he used the mails repeatedly to execute this scheme; indeed, the evidence is overwhelming that he did. Fryar used the mails to obtain and transmit the application forms for Westside's certificate of need; to help create All American and interpose it in the transaction; and to send the land transaction documents to All American. He also caused others to use the mails to transmit the sales circulars that erroneously portrayed Fryar as purchasing and pledging

$2,000,000 of mails to be used in an attempt to cover up the fraud and deceive bondholders into believing All American was performing more obligations that what it had actually undertaken.[30] Thus, the evidence strongly supports the jury's RICO verdict.

V. State Law Claims.

The bondholders also urge various state grounds for imposing substantive liability upon Fryar and WLJ. They allege that defendants violated the Louisiana Blue Sky Law (LBSL) (La.R.S.

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30. We have stated that a person "need only have had a reasonable basis to foresee that his actions would result in the use of the mails" to be convicted of mail fraud. United States v. Georgalis, 631 F.2d 1199, 1206 (5th Cir. Unit B 1980). Here, Fryar had a reasonable basis to foresee that the underwriters and brokers would use the mails to sell the bonds and reassure the investors once the bonds were sold.

51:701 et seq.), negligently misrepresented and/or fraudulently misrepresented material facts (La.Civ.Code arts. 2315, 1953), committed fraud (La.Civ.Code art. 1953), and aided and abetted others in violating the law (La.Civ.Code art. 2324). The bondholders also claim that WLJ breached a fiduciary duty to them and committed legal malpractice. We now consider the merits of these claims.

A. Louisiana Blue Sky Law.

For exactly the same reasons that the defendants are not "sellers" under section 12, they are not "sellers" within the meaning of the LBSL. The LBSL was modeled after the federal Securities Act. Caldwell v. Trans-Gulf Petroleum Corp.,

322 So.2d 171, 174 (La.1975). The relevant language of the LBSL is virtually identical to the language of section 12.[31] Although there are no

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31. The relevant language of the LBSL, as it existed throughout the period relevant to this appeal, reads:

> § 715 [of Title 51]. Civil liabilities
>
> A. Any person who...offers or sells a security in violation of [the LBSL]...is liable to the person buying the security from him....
>
> B. Every person who directly or indirectly controls a seller liable under Subsection (A), every partner, officer, or director of such a seller, every person occupying a similar status or performing similar

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Louisiana cases discussing "seller" status under the LBSL, in the absence of Louisiana authority, its state Louisiana courts interpret the LBSL in accordance with federal precedents. Ed v. Nationwide Candy Division, Ltd., 403 So.2d 780, 785 (La.App.3d Cir.), writ

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functions, every employee of such a seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller....

Neither WLJ nor Fryar was a controlling person, a broker-dealer, agent selling the bonds, or a partner, officer, or director of any organization that might be considered a "seller." Thus, § 715(B) does not apply to this case.

denied, 407 So.2d 732 (La.1981).[32] Accordingly, the logic of the Supreme Court's Pinter decision is fully applicable to the LBSL.

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32. Cf.Landry v. All Am. Assur. Co., 688 F.2d 381 (5th Cir. 1982) (applying federal tolling doctrine to LBSL in the absence of contrary Louisiana authority); Huddleston v. Herman & MacLean, 640 F.2d 534, 551 & n. 27 (5th Cir. Unit A Mar. 1981), rev'd in part on other grounds, 459 U.S. 375, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983) (applying federal case law defining "seller" under the federal Securities Act to Texas blue sky statute in the absence of contrary Texas authority). Both the plaintiffs and WLJ have stated in briefs that the determination of "seller" status under the LBSL should be the same as the determination of "seller" status under § 12.

B. Negligent Misrepresentation; Fraudulent Misrepresentation.

The bond holder of plaintiffs assert several Louisiana claims based upon misrepresentation. Each of the misrepresentation claims plaintiffs allege - negligent misrepresentation and fraudulent misrepresentation - requires the plaintiffs to prove reliance.[33]

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33. Negligent misrepresentation, according to Louisiana jurisprudence, is encompassed within the broad language of articles 2315 and 2316 of the Louisiana Civil Code. Devore v. Hobart Mfg. Co., 367 So.2d 836, 839 (La.1979). To prevail on a claim of negligent misrepresentation, the plaintiff must show that the defendant owed a legal duty to him to provide correct information, a breach of that duty, and resultant injury to the plaintiff. Beal v. Lomas & Nettleton Co., 410 So.2d 2d 318, 321 (La.App. 4th Cir. 1982); Josephs v. Austin, 420 So.2d 1181, 1185 (La.App. 5th Cir. 1982), writ denied, 427 So.2d 870 (La.1983). In analyzing claims of negligent misrepresentation, Louisiana courts have referred to the

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Under Louisiana law, reliance means actual reliance. La Croix v. Recknagel, 230 La. 842, 89 So.2d 363, 367 (La.1956); Luquette v. Floyd, 147 So.2d 894, 899 (La.App. 1962), writ denied, 244 La. 119, 150 So.2d 585 (1963).

Here, the class has completely failed to prove that most of its individual members actually subjectively relied upon

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Restatement Second of Torts. Dousson v. S. Cent. Bell, 429 So.2d 466, 468 (La.App. 4th Cir.), writ not considered, 437 So.2d 1135 (La.1983). See also Silver v. Nelson, 610 F.Supp. 505, 521 (E.D.La.1985).

Specifically, Louisiana courts have adopted the definition of negligent misrepresentation set forth in the Restatement (Second) of Torts § 552, which states,

(1) One who, in the course of his business, profession or employment or in any other transaction in which he has a pecuniary interest, supplies false information for the

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any misrepresentations. Only Abell and Walton established that they relied upon anything Fryar represented to be true, and neither of these two plaintiffs showed that he relied at all upon WLJ.

Moreover, the trial court ruled that any damages awarded under these claims would duplicate damages awarded under rule 10b-5. Since we agree and have held

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> guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. [Emphasis added.]
>
> In general, the elements of a claim of fraudulent misrepresentation or fraud may be stated as follows: (1) a misrepresentation of a material fact, (2) made with the intent to deceive, and (3) causing justifiable reliance with resultant injury. See La.Civ.Code arts. 1847, 2315; see also Silver v. Nelson.

already that Fryar is liable to Abell and Walton for violating rule 10b-5, we defer further discussion of these claims to our discussion of the appropriate damages.

C. Legal Malpractice

As we describe above, the law traditionally has allowed only clients or former clients to state malpractice claims against attorneys. Here, we see this principle applied: The bondholders seek to hold WLJ liable to them for malpractice in the work WLJ prepared for the underwriters. Under Louisiana law, the bondholders ordinarily may maintain such an action only where the lawyer prepares an opinion for the benefit of the non-client plaintiff and knows the third party will rely upon that opinion.[34]

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34. Non-clients may also sue attorneys, who are the agents of their clients,

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This test for attorney liability to non-clients was developed first in Capital Bank & Trust Co. v. Core, 343 So.2d 284 (1st La.App.), writ denied, 345 So.2d 61 (La.) and 345 So.2d 504 (La. 1977). Core, an attorney, issued Capital a title opinion covering the property described in the collateral mortgage, knowing that Capital would rely thereon in making the loan to Core's client and also knowing the loan would not be made unless his client owned the mortgaged property in full ownership and free of

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for actions that exceed the scope of authority given by the clients. Sondes v. Sears, Roebuck & Co., 501 So.2d 829 (4th La.App. 1986). Such actions follow the law regarding third-party complaints against agents who exceed their authority. Since the bondholders do not allege that WLJ overstepped its bounds as an agent for the underwriters, we need not consider such a complaint here.

all encumbrances except the collateral mortgage to Capital. Core's title opinion certified his examination of title and stated date and hour as of which time Core found the mortgaged property was owned by his client free of all encumbrances save the collateral mortgage to Capital.

Notwithstanding Core's title opinion, the mortgaged property was burdened with severe defects and encumbrances. Despite Core's knowledge that these statements were false, "he consciously and deliberately certified the truth and accuracy of his opinion." 343 So.2d at 289.

The appellate court held the attorney liable to the bank, reasoning that where an attorney furnishes a title opinion to a non-client knowing the third party

would rely upon the opinion, the attorney is liable to the third party. Id. at 288. Significantly, the court grounded its decision in the codal provision that establishes liability for a stipulation pour autrui pursuant to which one may bind himself for the benefit of a third party. In such cases, privity of contract results, and the agreement becomes acceptance. Id; La.Civ.Code art. 1890.

Another Louisiana appellate court has held that attorney liability to third parties does not extend beyond the Capital Bank rule. In Clause v. Manuel, 442 So.2d 905 (3d La.App. 1983), writ denied, 448 So.2d 106 (La.1984), the court refused to hold a land purchaser's attorney liable to the vendor for the negligent title opinion the attorney

prepared. The purchaser bought the property after his attorney issued a title opinion assuring the purchaser (and his financing bank) that the title was clear. Two and one-half years after the transaction, the purchaser discovered a tax lien the vendor had failed to pay. The purchaser sued the vendor, who then brought a third-party complaint against the attorney. The vendor, claiming she would have insisted on a higher price had she known of the encumbrance, sought indemnification from the lawyer.

The court affirmed summary judgment on the third-party complaint. It noted that the vendor had never retained the attorney, and that the lawyer did not advise her. As the Clause court wrote, "To render [the attorney] liable..., we would have to find that his title exam-

ination and title opinion were rendered for the benefit of [the vendor]." 442 So.2d at 908.

We emphasize that this rule, which we consider eminently sound, does not reduce attorneys' responsibility for their work, but merely prevents attorneys from dividing their loyalties between clients and non-clients. More recent cases reveal that Louisiana courts are concerned acutely about the ethical problems of confidentiality and loyalty that are exposed when the law requires attorneys to reveal information to non-clients.

The Louisiana Supreme Court recently ruled that a client does not have a malpractice claim against its own attorney for failing to reveal confidential information unless the client explicitly orders the disclosure.

Rayne State Bank & Trust Co. v. Nat. Union Fire Ins. Co., 483 So.2d 987, 992 (La.1986). The importance of preserving client confidences is even more vividly highlighted in Scaccia v. Lowe, 445 So.2d 1324 (La.App. 4 Cir. 1984). There, the court refused to hold attorneys for a divorced woman liable for her former husband when they refused to tell him where she had hidden his minor child.

These cases underscore how basic attorney-client confidence and loyalty is to the American justice system. To protect those values, Louisiana allows third-party suits only if the attorney prepares an opinion for the non-client on which he knows the non-client will rely. Thus, the attorneys, who are always responsible to their clients and to the bar and the courts for their professional

actions, may control when they assume a duty to third parties for their legal opinions.

This rule is identical to the one we formulate today to govern the liability of underwriter's counsel to investors who purchase the underwritten securities. We hold that the bondholders have failed to state a malpractice claim against WLJ.

D. Fiduciary Duty.

The bondholders also assert that WLJ breached a fiduciary duty it owed to them. We cannot find any Louisiana statute or case upon which plaintiffs base their claim, and they refer use to none. We assume, therefore, that their claim is grounded in the general delictual principles of Civil Code articles 2315 and 2316 and of the Restatement (Second) of Torts. In

particular, section 552 of the Restatement provides in relevant part:

> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

We hold that the Restatement provision, assuming it is part of Louisiana law, does not apply here. Bondholders do not suggest any public duty which WLJ has violated. As we have shown, WLJ had no attorney-client relationship with any of the bondholders and did not issue a signed legal opinion to the plaintiffs. Moreover, we cannot find any specific duty to the public which the securities laws impose upon attorneys. "Neither lawyers nor accountants are required to tattle on their clients in

the absence of some duty to disclose. To the contrary, attorneys have privileges not to disclose." Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 497 (7th Cir. 1986) (citations omitted). Consequently, WLJ had no fiduciary duty to breach.

E. Aiding and Abetting.

At the time Westside offered its bonds to the public, Louisiana had a single statute that provided the basis for most vicarious or inchoate liability under Louisiana law. In 1982, that statute, Article 2324 of the Louisiana Civil Code, read in relevant part:

> He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, in solido, with

> that person, for the damage caused by such act.[35]

The bondholders argue that WLJ is liable under this section for having aided Swink (and Fryar) in defrauding the investors who bought up Westside's bond offering.

In deciding this issue, as in deciding whether to impose rule 10b-5 liability upon someone who helps another to violate that rule, we focus primarily upon the element of scienter. Article 2324 does not specify the answer to this question, but several cases have analyzed it.

Equilease Corp. v. Smith Int'l, Inc., 588 F.2d 919 (5th Cir. 1979), is the leading case in our circuit discussing what level of scienter satisfies article 2324. There, a middleman who bought drill pipe for oil explorers found itself

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35. Louisiana has since amended article 2324 (in 1987), and it no longer contains this language.

threatened with bankruptcy. The middleman's primary creditor was the drill pipe manufacturer who had sold it. The middleman conspired with a financing company to defraud one of the financer's clients, a venture capitalist, of funds the middleman desperately needed to remain afloat. To that end, the middleman and financer forged several of the manufacturer's documents, including pipe invoices, to convince the venture capitalist that the middleman owned more assets than he actually did. The venture capitalist, relying upon the forged documents, loaned the middleman the needed funds.

At the same time, the manufacturer began pressing the middleman hard to make good on some late payments. Worried that the manufacturer would put it in default,

the middleman called the financer, who had possession of the venture capitalist's checks, and ordered the financer to expedite its paperwork. In its rush, the financier sent the manufacturer a suspiciously large check, and accidently included one of the forged invoices.

The manufacturer thought the size of the check peculiar, but did not catch the forgery in the invoice until after it had cashed the check. Once it did catch the forgery, it called the financer, whom the manufacturer thought had originated the new loan to the middleman. (The venture capitalist wished its efforts to remain anonymous, and thus allowed the financer to take all public actions for the venture capitalist.) Naturally, the financer, whose part in the fraud the

manufacturer had no reason to suspect, reassured the puzzled manufacturer that all was well. The manufacturer did nothing else, and the venture capitalist did not discover the fraud itself until the bankrupt middleman was no longer able to return the purloined money.

In Equilease, the plaintiff venture capitalist argued that the defendant manufacturer, who had no knowledge of the fraud it purportedly had assisted, was liable under a theory of negligence. The venture capitalist suggested two theories to support the proposition that a negligent defendant could be liable for assisting in fraud, which requires knowledge. First, according to the venture capitalist, Louisiana employs a theory of "negligent ignorance" that requires someone who should suspect fraud

to investigate and act to thwart the fraud. We agreed with the venture capitalist that

> [i]n certain situations Louisiana courts have recognized the common law principle, often styling it 'negligent ignorance', that knowledge of the results of a proper investigation can be imputed to a person who has actual knowledge of elemental facts, yet fails to inquire into their significance.

Id. at 926.

Nonetheless, we reviewed the confused case law of Louisiana and concluded that Louisiana utilizes this tort theory primarily in real property title suits. In such cases, land investors who should have suspected title defects, but failed to investigate, were estopped where the rightful owners sued to regain title. We declined to extend the doctrine of

"negligent ignorance" to hold negligent abettors liable for fraud:

> Knowledge is imputed in these [real property] cases to estop the defendant from taking inequitable advantage of a predicament caused by his own failure to investigate. We are not concerned here with preventing the defendant from obtaining an unfair advantage of his own but with imposing a further obligation on the defendant to compensate the victim of fraud for the loss he sustained. Moreover, the predicament of the plaintiff was not caused by the direct action of the defendant since he was not originally a party to the fraudulent transaction. Rather, the defendant's relationship to the plaintiff arises only from the fact that he may have been able to prevent the predicament had he investigated the possibility that he was assisting a fraud.

Ids. at 927-28 (footnote omitted).

We then turned to the venture capitalist's theory that an abettor, like a joint tortfeasor, may be held liable under Louisiana law for negligently assisting and intentionally inflicting harm. We held:

> Logically, a party may be held individually liable for negligence whether the damage caused to the plaintiff takes the form of fraud or bodily injury. And we perceive no impediment to binding a defendant who acts negligently in solido with those who commit an intentional tort when the same harm to the plaintiff results, provided, of course, that each party is legally at fault.

Id. at 929 (footnotes omitted).

The bondholders argue that Equilease applies here. We agree, but hold WLJ not liable. To be "legally at fault," one must owe a duty to the person harmed. In Equilease, we held that the manufacturer

had no knowledge of the venture capitalist's existence and no concrete evidence of unlawful activity in light of the financer's assurances. We concluded that the manufacturer owed the venture capitalist no further duty to investigate. Similarly, we have already held that WLJ owed no duty to the bondholders to disclose client confidences which WLJ had a duty to keep.[36]

We come to the same conclusion when we examine the single relevant Louisiana case decided since Equilease. In Summers

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36. Bank of New Orleans & Trust Company v. Monco Agency, Inc., 823 F.2d 888 (5th Cir. 1987), cert. denied, ___ U.S. ___, 108 S.Ct. 1019, 98 L.Ed.2d 984 (1988), is inapposite because that case only reversed a summary judgment in favor of accountants which had held a bank's claim to be time barred. The issue of accountant's duties to nonclient third parties (such as the bank) was not raised or decided by that appeal.

Brothers v. Brewer, 420 So.2d 197 (1st La.App. 1982), the perpetrator of a fraudulent scheme to raise funds for a non-existent business succeeded because he had forged a maintenance contract an obtained unauthorized stock in another company. Both documents impressed the business men he had targeted for the fraud, and convinced them that the non-existent business was real. The maintenance contract was notarized by an attorney who did not witness anyone signing the document, and thus did not know it had been forged. Similarly, the schemer got the "issuing" company's attorney, who knew the perpetrator was a felon, to sign the unauthorized stock certificates.

The appellate court held that article 2324 did not impose liability upon either

lawyer. The Court determined that the attorneys' actions

> were independent acts, with the fraudulent scheme ...already set in motion before [the lawyers] participated in the fraud. Furthermore, some of the damages caused to plaintiffs by [the attorneys] were not the natural and foreseeable consequences of the earlier fraudulent acts of [the perpetrator], but were rather the result of particular wrongdoing or fault on the part of [the lawyers]....

420 So.2d at 204. Thus, where the assistance rendered is comprised of actions that do not involve the abettor directly in the fraud, article 2324 does not apply. This conclusion is reinforced if the assistance itself creates a harm unique and independent from any harm foreseeable from the original fraud.

Summers Brothers appears to vitiate

Equilease's teaching that a negligent tortfeasor may be independently liable for another's fraud where the negligence is independent of the fraud and compounds the fraud's harm. However, negligent tortfeasors whose acts are not independent of the fraud still must owe a duty to those whom the fraud harms; otherwise, the fraud victims may not prevail against the negligent actor. Here, WLJ owes no such duty.

VI. Damages

Both sides also raise a variety of damages issues touching on virtually every aspect of the lawsuit. We turn now to the damages findings of thing jury and the damages awarded by the court.[37]

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37. Since we decide all liability issues favorably to WLJ, the damage issues apply now only to Fryar. Of course, certain of the arguments as to damages were presented by WLJ.

A. Rule 10b-5 Damages.

The jury found that the plaintiffs suffered $9,549,000 in lost Westside bond interest payments because of defendants' fraud,[38] but refused to award plaintiffs any out-of-pocket damages. The jury also found that the Cheneyville land transaction land transaction, in which All American received $2,000,000 worth of Westside bonds that later entitled it to substantial interest payments, unjustly increased All American's wealth by $2,950,000. The defendants attack this award on two grounds, and the plaintiffs attack it on one ground of their own.

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38. Since the jury found that the defendants who had already settled were 30% responsible for the securities fraud, the court awarded only 70% of $9,554,000 (or $6,715,800) against the defendants who stood trial.

First, the defendants argue that the evidence of damages which the plaintiffs presented was too vague and flawed to support any specific damages award. Since we have overturned the judgment in favor of the class as a whole, these damages must be redetermined, in any event.

Second, and more fundamentally, the defendants contend that rule 10b-5 plaintiffs may collect only out-of-pocket damages, which the jury found the plaintiffs had not suffered. Defendants also argue that plaintiffs are entitled to only one award under rule 10b-5,[39] and

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39. Section 28(a) of the Exchange Act, upon which defendants rely in arguing that the plaintiffs received an impermissible double recovery, reads in relevant part:

> The rights and remedies provided by this chapter shall be in addition to

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that the award for lost interest should be affirmed only to the extent it exceeds the $2,950,000 windfall profit which All American must repay to the bondholders.

Before we consider this challenge, however, we will examine Abell and Walton's response. They counterattack the jury's determination that the plaintiffs suffered no out-of-pocket damages, claiming that the evidence does not support such a verdict.

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> any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of.

15 U.S.C. § 78bb(a).

We do not agree with plaintiffs that the jury should have found that the bondholders suffered some out-of-pocket damages. Such out-of-pocket damages, the traditional measure of damages in a rule 10b-5 action, are "the difference between the real value of [the securities at issue] and the amount paid by the plaintiffs at the time of purchase." James v. Meinke, 778 F.2d 200, 205 (5th Cir. 1985) (emphasis added.) Here, measured at the time of purchase, the jury could find that the bondholders paid only what the bonds were worth. The market price for Westside bonds did not fluctuate much in the first few years after Westside issued them. Even after Westside revealed, in a letter dated January 20, 1983, the information that

previously had been withheld, prices for Westside bonds remained stable.

Indeed, plaintiffs did not sustain any actual losses until Westside defaulted on an interest payment in October 1984, more than three months after filing this suit. After that default, the bonds temporarily lost much of their face value, but rebounded to about par value after the bankruptcy court allowed Westside to reduce the interest rate which each of the bonds bore. Consequently, few of the Westside bondholders lost any money out of their own pockets, and none who paid the face value of the bonds at any time before October 1984 paid more than the bonds were worth.

Defendants aggressively contend that rule 10b-5 awards damages only for out-of-pocket losses. They argue that we

adopted this rule in Huddleston. As defendants note, Huddleston observed that "the out-of-pocket rule...is the traditional measure of damages in a rule 10b-5 action...." 640F.2d at 555. We noted that out-of-pocket losses, properly calculated, measure how much the defendants' fraud inflates the value of the subject securities. The out-of-pocket thus distinguishes between losses caused by defendants' fraud and losses caused otherwise (e.g., by market forces). Id. Consequently, this rule ordinarily is the correct measure of rule 10b-5 damages.

"The ultimate question, however, is how much damages did the defendants' fraudulent misstatement or omission cause each individual plaintiff?" Id. at 554. The Supreme Court has approvingly noted

that various other measures of damages can be used in section 10b-5 cases where out-of-pocket damages provide an inadequate measure. Randall v. Loftsgaarden, 478 U.S. 647, 663, 106 S.Ct. 3143, 3153, 92 L.Ed.2d 525 (1986). Since Huddleston, we have applied yard-sticks other than the out-of-pocket measurement where appropriate. See James v. Meinke (imposing consequential damages where jury found no out-of-pocket damages).

In this instance, the plaintiffs argue, the out-of-pocket rule does not accurately measure their losses. Here, the initial value of the possessory interest in the bonds was equal to the par value of those bonds; the bond-holders did not suffer any losses until Westside went bankrupt and eventually re-

organized. With reorganization, the interest rates which the bonds bore dropped to about two-thirds of the original rates. The decrease in the interest rates naturally reduced the value of the possessory interest from what it would have been otherwise.[40]

Since the fraudulently-concealed details of the Westside land transaction and Fryar's shaky guarantee to support Westside financially caused Westside's bankruptcy, the defendants' fraud caused the bondholders to sustain two types of

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40. The defendants, noting that the bonds still trade close to par value, argue that the bondholders' possessory interest did not shrink because of Westside's bankruptcy. This argument, however, misses the mark; Westside bonds presumably would be trading at significantly above par value had Westside continued to pay the original interest rates.

property loss: the loss of a reasonably certain, legally guaranteed stream of income, and the resulting loss of some of the resale value of the bonds. The former is not a loss which the out-of-pocket rule can measure.

We agree with bondholders, therefore, that rule 10b-5 may compensate them for the loss of a contracted right to a guaranteed stream of income. The right to receive a specified stream of income is a property right distinguishable from possessory interests in the bonds themselves. The possessory interest allows the purchaser to hold or dispose of the bonds as the purchaser sees fit and entitles the holder to enjoy any subsidiary interests, including the right to receive any income stream which the

bond pays, that have not been alienated from the possessory interest itself.

The right to receive income-stream payments (or, in the case of bonds, interest payments) is a distinct interest that is subsidiary to the purchaser's possessory interest. As a landowner may sever subordinate mineral rights, so may a bondholder sever the distinct right to income payments (the coupons) from the bond itself.[41] Consequently, an investor purchasing a bond acquires at least two separate property interests vulnerable to the destructive fraud of another.

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41. The classic example of a bondholder who alienates the interest payments from the possessory interest is one who sets up a trust arrangement (assuming the cestui has a legal right to the interest payments as well as an equitable right).

Were we to adopt the defendants' position that only out-of-pocket damages are available, we would effectively limit rule 10b-5 plaintiffs to damages to their possessory interests only - the price paid for the security minus its real value at the time of purchase. Thus, plaintiffs would be unable to collect all the actual damages which the fraud ultimately causes.

Here, since the plaintiffs also acquired a right to future interest payments, the damage award must reflect the interest payments plaintiffs lost because of defendants' fraud. Since the fraud, like a cancer, began its destructive course from the time of purchase, we measure the damage to the right to an income stream according to a formula similar to our out-of-pocket

damage calculation: Plaintiffs are entitled to the difference, discounted to present value at the time of purchase, between the stream of income as represented and the income stream remaining after the fraud has worked its course.

Unfortunately, the expert who calculated and explained to the jury the interest payments which the bondholders had lost discounted the value of those payments to their present value at the time of trial. These calculations, which were the only damages figures upon which the jury could base its verdict, must be recomputed to determine their present value at the time the bonds were purchased. We therefore remand for the district court to recalculate Abell's and Walton's lost interest payments.

On remand, we instruct the district court not to recompute how the lost interest payments reduced the bondholders' possessory interest. We measure the damage done to possessory interest by the out-of-pocket rule only. Since the jury found no out-of-pocket damages, the plaintiffs are not entitled to any compensation for lost value.[42]

The defendants forcefully urge us to instruct the district court to reduce the rule 10b-5 award by the amount of interest income which the bondholders earned before Westside defaulted on interest payments. The defendants note

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42. In fact, the expert proved only that the fraud reduced the value of the bonds to par value. Consequently, the fraud only reduced the profit which investors could have made from Westside bonds; it did not reduce the bonds' value to less than what the bondholders paid for them.

that the Supreme Court, in Randall, held that rule 10b-5 damages awards ordinarily should reflect the actual damages which the plaintiffs incur. Since the income a bondholder receives from a bond reduces that bondholder's actual damages, income should be deducted from the damage award. The defendants claim that the interest payments here are such income, relying upon cases requiring courts to reduce damages by the dividend income earned on subject securities.

We conclude, however, that Randall is inapposite. Here, plaintiffs claim injury to their right to receive specified contractually-set interest payments. They had an established property right to receive an invariable stream of income at specified moments

over a pre-determined contractual period.[43] Plaintiffs claimed, and proved, that Fryar, All American, and other fraudulently undermined their rights to future interest payments. It hardly makes sense, in determining what amount of damages will make plaintiffs whole again, to reduce the award by the interest payments which plaintiffs received in the past. Such a result would "make whole" only those plaintiffs who agreed to forsake part of what defendants had destroyed.

Nor do we think that our rule today conflicts with existing law. Randall, for instance, recognized that courts must

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43. That the terms of any given bond might differ dramatically from the terms of any other bond is of no consequence, since the terms of each bond were unambiguously established.

reduce section 12 damages awards by the income which a section 12 plaintiff receives from owning the subject security. In this case, where we must decide what damages will compensate a rule 10b-5 plaintiff, Randall directs us to determine the "actual damages" which the plaintiff has incurred. Were we considering the damage done to plaintiffs' possessory interest in the bonds, we would have to offset any award by the income which that possessory interest had reaped for its owners. Here, however, the property interest damaged was a right to receive a specific stream of income; offsetting such a damage award by income received under the bond agreements makes little sense.

The defendants make one final attack upon the damage award. They argue that

if the plaintiffs collect both the $2,950,000 All American must pay for unjust enrichment and all of plaintiffs' lost interest income, the plaintiffs will receive an unjust double recovery. We agree, and direct the district court on remand to award only the lost interest that exceeds what All American must pay for unjust enrichment.

Section 28(a) of the Exchange Act limits rule 10b-5 plaintiffs to actual damages. Randall, 478 U.S. at 662. Rule 10b-5 exists primarily to compensate victims and secondarily to deter securities defrauders; as long as the award necessary to compensate victims is enough deter wrongdoers, we would not award additional deterrent damages. We award such deterrent damages, including damages for unjust enrichment, only when

compensatory damages allow the wrongdoers to profit from their fraud. Of course, when we award deterrent damages, they always exceed or equal compensatory damages, and thus it is not necessary to award additional, duplicative "compensatory" damages.

Succinctly put, section 28(a)'s actual-damage rule ordinarily requires us to award plaintiffs only what they actually lost. But "where the defendant received more than the [plaintiffs'] actual loss...damages are the amount of the defendant's profit." Affiliated Ute, 406 U.S. at 155, 92 S.Ct. at 1473. In any event, we never award plaintiffs both their actual loss and defendant's unjust enrichment, because that would amount to an impermissible double recovery. "[T]he accepted rationale underlying this

alternative is simply that '[i]t is more appropriate to give the defrauded party the benefit even of windfalls than to let the fraudulent party keep them.'" Randall, 478 U.S. at 663, 106 S.Ct. at 3153 (emphasis added) (quoting Janigan v. Taylor, 334 F.2d 781, 786 (1st Cir.), cert. denied, 382 U.S. 879, 86 S.Ct. 163, 15 L.Ed.2d 120 (1965)).

B. RICO Damages.

1. Sufficiency of the Evidence.

Fryar argues that the RICO damages assessed against him and All American (1) should be overturned because Fryar and All American did nothing to harm the bondholders' business and property interests, or, alternatively, (2) should be reduced by one-third, because the compensatory portion of the RICO award duplicates the securities-fraud damages.

We reject Fryar's first argument because, as we have already shown, Fryar and All American's securities fraud substantially harmed the plaintiffs' right to future interest payments. As Fryar himself concedes, the plaintiffs base their securities fraud claim upon the same factual allegations as those supporting their mail-fraud RICO claims against Fryar. Since reliance is not an element of the class's RICO claims, it follows that the proof of its damages which the class presented suffices to show that Fryar and All American caused measurable RICO damages against the class members.

Fryar contends that the plaintiffs presented only flawed and inadequate evidence to quantify their damages. The crux of Fryar's argument is that the

expert testimony which the plaintiffs used to establish damages was based upon faulty assumptions and questionable data. The data consisted of questionnaires, some not completed, which some of the Westside bondholders had answered. The bondholders who returned their questionnaires included people who were not members of the plaintiff class and people who did not buy their bonds from any defendants named in plaintiff's complaint.

Fryar also attacks the expert's calculations based upon this data: Fryar argues that the expert failed to adjust his calculations to account for class members who had sold their bonds, for bondholders who had bought Westside bonds after Westside's bankruptcy, and for the interest income the bondholders earned

before Westside went bankrupt. Finally, Fryar argues that the jury verdict does not reduce the plaintiffs' damages to reflect causes other than fraud that contributed to plaintiffs' lost interest income.

We reject Fryar's arguments. Albert Derbes, the plaintiffs' damages expert, calculated that the class had lost $8,616,973 in future interest payments discounted to present value at the time of trial.[44] Derbes explained that accounting experts such as himself customarily rely upon questionnaires, similar to the one which Fryar attacks, to compute such lost interest payments.

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44. Plaintiffs also introduced evidence that after Westside defaulted on its interest payments in October 1984, the class lost, as of the date of trial, an additional $3,402,146.60 in past-due interest payments.

Second, the class does not include persons who purchased Westside bonds after it defaulted on its interest payments, and thus Derbes's calculations (of the class's losses) do not include such bondholders. Neither do we do agree that the jury verdict fails to reduce the award to account for other causes that contributed to plaintiff's losses. Since the jury awarded plaintiffs considerably less than the damages which they proved at trial, we assume the jury adequately accounted for any additional causes of plaintiffs' damages.

2. Duplication of RICO and Securities Damages.

The defendants argue that the potential securities fraud award under rule 10b-5 should be reduced by the RICO award against Fryar and All American.

They contend that RICO is primarily remedial, and that its treble damages should be considered compensatory relief and thus subject to the single-recovery rule. In defendants' view, we should apply section 28 of the Exchange Act to reduce rule 10b-5 damages to account for the compensation which the plaintiffs obtain under RICO.[45]

We are not directed, however, to any of our cases that address the nature of Rico in this regard. After conducting our own search of applicable authorities, we have concluded that none of our sister circuits has considered this question either. We acknowledge that several district courts have expounded learnedly

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45. Of course, in light of our exoneration of WLJ on liability, this damages issue now can affect recovery only against Fryar.

on how to characterize RICO damages,[46] but there are no extant opinions that bind us today. We write, therefore, on an essentially clean slate.

At least a portion of the RICO damages should be deemed remedial. Civil damages under RICO are available only to those persons "injured in [their] business or property by reason of a [RICO] violation..." 18 U.S.C. § 1964(c). Congress directed the courts that RICO as a whole "shall be liberally construed to effectuate its remedial purposes."

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46. Compare State Farm Fire & Cas. Co. v. Estate of Caton, 540 F.Supp. 673, 680 (N.D. Ind.1982); In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig., 636 F.Supp. 1138 (C.D. Cal. 1986) (holding that all RICO damages are compensatory) with Summers v. FDIC, 592 F.Supp. 1240 (W.D. Okla.1984) (holding that the trebled portion of RICO damages is penal).

84 Stat. 947, 18 U.S.C. § 1961 note.

Here, whatever portion of RICO relief is remedial duplicates the damages awarded under rule 10b-5. The evidence fails to show that the defendants caused any harm to plaintiffs' business or property other than to reduce their interest income from Westside bonds. As we have already discussed, the individual plaintiffs are entitled to recover from All American all the unjust enrichment which All American gained from Westside. Thus, we must adjust Abell's and Walton's damage claims. Since All American's gains (valued by the jury at $2,950,000) exceed the RICO damages ($2,550,000), the only question is: How much of the RICO award is compensatory and thus duplicative of rule 10b-5 relief?

The answer to this question turns on the nature of treble damages under RICO. Congress provided, in 18 U.S.C. § 1964(c), that RICO plaintiffs are entitled to treble proven damages and a reasonable attorneys' fee. We must determine whether the trebling feature of section 1964(c) damages is penal or remedial. If remedial, treble damages are entirely compensatory, and the rule 10b-5 award must be reduced by the entire amount of the RICO award attributable to Abell and Walton. If RICO's trebling formula is penal, then only one-third of the RICO damages are compensatory, and the securities fraud damages are to be reduced by one-third of Abell's and Walton's RICO recoveries.

Courts faced with the task of determining whether a statute is penal in

nature need not venture upon uncharted seas, for the standard of analysis has been defined since the case of Huntington v. Attrill, 146 U.S. 657, 668-69, 13 S.Ct. 224, 228, 36 L.Ed. 1123 (1892):

> The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackston: 'Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed civil injuries: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of crimes and misdemeanors.' [Emphasis in original.]

On the basis of the Supreme Court's opinion and its progeny, the Sixth Circuit in Murphy v. Household Fin. Corp., 560 F.2d 206, 209 (6th Cir.1977), distilled three factors to be used in determining whether the statute is penal: (1) whether the purpose of the statue is to redress individual wrongs or more general wrongs to the public; (2) whether the recovery under the statute runs to the harmed individual or to the public; and (3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered.

We have never adopted the Sixth Circuit test, but have instead accepted it as a useful tool in interpreting Huntington. Cf. First Nat'l Bank & Trust Co. v. Flatau, 643 F.2d 1988, 191 (5th

Cir. 1980). In that vein, we note the following passage from Huntington:

> In the municipal law of England and American, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offense against its laws. [Citations omitted.] But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered.

146 U.S. at 666-67, 13 S.Ct. at 227 (emphasis added) (as quoted in First Nat'l Bank & Trust Co. v. Flatau, 643 F.2d at 190).

We hold that the portion of RICO damages in excess of actual damages is penal. Those added damages are "not

limited to the damages suffered"; they seem more designed to deter than to compensate. As Congress constructed them, the civil provisions of RICO compensate primarily victims of fraud or fraudulent schemes. Had Congress merely wanted to make whole this new class of plaintiffs, it would have limited civil RICO damages to the actual damages commonly available to fraud victims.

However, in promulgating RICO, Congress expressly found that the problem of racketeering was primarily public, not private, including draining resources from the economy, subverting the democratic process, and undermining the general welfare. 84 Stat. 922-23 (1970) (findings and purpose of the Organized Crime Control Act of 1970, Title IV of which is RICO). See also Summers, 592

F.Supp. at 1242. We conclude, therefore, that Congress trebled RICO damages as part of this overall attack on the public wrongs of organized crime.[47]

C. Attorneys' Fees.

The district court, after an extensive hearing, awarded $2,567,323.30 in attorneys' fees. In spite of the

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47. Our result would be the same had we applied the Murphy three-pronged test. First, although the purpose of § 1964(c) is to redress both public and private wrongs, the trebling component of that provision appears to be aimed primarily at remedying public wrongs. Second, recovery under § 1964(c) obviously runs to the individual, a factor suggesting the statute is not penal. But finally, the authorized penalty is plainly disproportionate to the individual harm redressed, since it is trebled. See Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639, 101 S.Ct. 2061, 2066, 68 L.Ed.2d 500 (1981) ("The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers.").

"American rule" that attorneys' fees shall be awarded as a matter of course only when a specific statute so authorizes, the court failed to indicate the basis for its decision. The defendants challenge this award.

WLJ contends that it is not substantively liable for violating any statute upon which the court may have based attorneys' fees. Since we have absolved WLJ of all liability, we agree and reverse the district court's judgment insofar as it holds WLJ and its insurer (Valley Forge) liable for attorneys' fees.

Fryar also argues that the district court should have assessed only those attorneys' fees necessary to develop the claims for which attorneys' fees may be awarded. He notes, correctly, that

attorneys' fees are not available as a matter of course under rule 10b-5. Huddleston, 640 F.2d at 559. Fryar argues that work done on the securities claims, under which plaintiffs may not receive attorneys' fees, undoubtedly consumed most of the legal resources which the plaintiffs spent on this case. Consequently, Fryar's position, should we adopt it as our own, would dramatically reduce the attorneys' fees to which plaintiffs are entitled.

We note first that Fryar's argument presents a case of first impression. Of the statutes upon which the plaintiffs based their claims, only RICO and the Louisiana fraud statutes allow a court to award attorneys' fees as a matter of right. We have not been directed to any cases interpreting these statutes in

regard to the attorneys' fees issue presented here.

We choose to adhere to a rule slightly different from the one which Fryar proposes. We think it best to apply the rule we have fashioned for awarding attorneys' fees in other areas of the law. Where plaintiffs base several claims, derived "from related legal theories," upon "a common core of facts," we allow attorneys' fees for the work done on all such related claims. Hernandez v. Hill Country Telephone Coop., Inc., 849 F.2d 139, 144 (5th Cir. 1988) (citing Hensley v. Eckerhart, 461 U.S. 424, 435, 103 S.Ct. 1933, 1940, 76 L.Ed.2d 40 (1983)); Espino v. Besteiro, 708 F.2d 1002, 1007-10 (5th Cir. 1983). As Fryar himself concedes, the RICO claims arise "from the matrix of"

plaintiffs' securities claims. All of the state-law claims which plaintiffs assert against Fryar also arise from the same transactions that underlie plaintiffs' RICO and securities claims against Fryar.

Nonetheless, we cannot simply affirm the district court's award, for that court awarded attorneys' fees against all the defendant who stood trial. Thus, the court awarded attorneys' fees for all of the legal work necessary to develop and try plaintiffs' case. Plaintiffs developed much of their case, however, to obtain a verdict against WLJ. Several of plaintiffs' legal theories and arguments applied only to WLJ; indeed, at least one of their claims (for legal malpractice) implicates only WLJ. Consequently, the district court must readjust the

attorneys' fees award to compensate plaintiffs only for the legal resources which they expended to develop a case against Fryar and All American. For this purpose, we will remand.

D. Judicial Interest.

To all of these awards, the district court added twelve percent per annum judicial interest calculated from the date of judicial demand. The defendants claim that they should not have to pay this interest, totaling about $1,000,000, on these awards because they are already paying damages equal to the interest rate which the bonds bear. The plaintiffs counter that the district court properly imposed judicial interest upon the lost interest damages, since the district court awarded lost interest to the plaintiff class to compensate plaintiffs

for the loss of the use of money that rightfully belonged to them.

The plaintiffs are correct. We add that the lost interest payments, which would have been due on virtually all the bonds until at least 1998, have already been discounted to present value. These damages do not represent the face value of the interest payments as they would have continued to come due, but the resale value, at a specific point in the past, of the right to receive those payments in the future. Consequently, the damages awarded for lost interest reflect losses which the plaintiffs have already sustained, but losses they will sustain in the future. The district court properly applied judicial interest.

VII. Valley Forge's Appeal.

Valley Forge, WLJ's malpractice insurer, has also appealed this case on a coverage question. The court tried Valley Forge along with All American, Fryar, and WLJ, and after trial adjudged Valley Forge liable in solido for all the awards against WLJ. Those awards exposed Valley Forge to potential liability exceeding $9,000,000. Valley Forge argues on appeal that WLJ's policy limits are $5,000,000, not the $10,000,000 the district court found.

We do not reach this argument. We merely note that Valley Forge is liable only to the extent WLJ is. Since we have reversed every basis for imposing liability upon WLJ, we now vacate the district court's judgment to the extent it imposes liability upon Valley Forge,

and we dismiss Valley Forge's appeal.

VIII. Jury Tampering

To summarize what we have held thus far: WLJ and Valley Forge are not liable under any legal theories of this case. Fryar, as a matter of law, is not liable under section 12 of the Securities Act or the LBSL, or to the plaintiff class for violating rule 10b-5 or any other state-law claims based upon misrepresentation. The evidence sufficiently supports Abell's and Walton's individual rule 10b-5 and state-law misrepresentation claims against Fryar, but the damages for those claims must be recalculated, because damages were determined for the entire class and not just Abell and Walton. Sufficient evidence also supports the jury verdict holding Fryar liable to the

class for violating RICO, but the damage award must be reduced by one-third to avoid double recovery. Sufficient evidence, more-over, supports all of the damage awards. Finally, the district court properly awarded attorneys' fees against Fryar and All American but improperly against WLJ and Valley Forge.

We review all these holdings at this stage in the opinion to remind the reader which are issues of law and which ones are based merely upon the sufficiency of the evidence. The importance of that distinction will soon become apparent, as we now turn to allegations that Fryar prejudiced the jury against himself by trying to bribe one of its members.

A. The Relevant Procedural Facts

A little over a month into the trial, the judge received information

from the FBI that Fryar was attempting to bribe several members of the jury. The FBI continued to investigate this allegation, but it had probable cause to believe that Fryar had targeted and contacted jurors Terracina and Teer. The judge questioned an FBI agent extensively in camera, outside the presence of the defendants and their attorneys, and satisfied itself that probable cause existed to believe that Fryar indeed had attempted to bribe Terracina and Teer.

The judge sealed the record of this in camera hearing, and kept the information to himself until the last day of trial. On that day, he called the attorneys into his chambers, informed them that he had probable cause to believe that someone was tampering with jurors Terracina and Teer, and told them

that he would excuse those jurors without giving any specific explanations to the jury. In open court, the judge excused Terracina and Teer from the jury, reducing the size of the jury to the six jurors who would deliberate the case.

After several hours of deliberation, the jury returned its verdict against the defendants. Immediately afterwards, the trial judge examined each of the jurors individually, outside the presence of the other jurors but in the presence of all the attorneys. Each of the jurors claimed to have heard nothing about the bribery attempt, and each swore that nothing had affected his or her decision. After this voir dire, the judge released the jurors to the custody of the FBI and the marshals so that these law enforcement authorities could continue

their jury-tampering investigation.

In the course of this police investigation, the FBI determined that most of the jurors actually knew about Fryar's attempt to bribe Terracina. When the court found out that the jurors had lied about their knowledge of Fryar's bribery attempts, it conducted a second voir dire, also in the presence of the attorneys.

In this second voir dire, the court determined that the jurors had decided collectively not to admit their knowledge of the bribery attempts. Each juror testified the second time that he or she had lied th first time because he or she did not consider the bribery stories that Terracina told to be the truth, and each juror wanted to avoid even the possibility of a mistrial, because the

jurors did not want their efforts to go for naught.

Terracina was viewed universally by his co-jurors as an unstable, unpredictable individual. Consequently, none of the jurors believed Terracina when he informed them that Fryar had offered him $10,000 to vote for Fryar. Some of the jurors discussed Terracina's story among themselves, and came to the same conclusion.

None of the jurors, however, had heard anything about any attempts to bribe Teer, a much more respected member of the panel. The jurors testified that they had been disappointed, and somewhat surprised, when the judge excused Terracina and Teer.

Most of the jurors testified that they had assumed that the last two jurors

chosen were alternates and would be the ones to be excused at the end of the trial. Since neither Terracina nor Teer was among the last two jurors chosen, several of the jurors immediately began to speculate as to why those jurors had been excused. A few admitted that they began to wonder whether there was any truth to the stores which Terracina had been telling them. Indeed, it was shortly after Terracina and Teer were excused that the jurors discussed what to do if asked about Terracina's story, and it was then that the jurors decided that they would lie.

Nonetheless, each of the jurors continued to insist that he or she still did not believe Terracina's story. Moreover, each juror insisted that what he or she knew about Fryar's attempts to

bribe Terracina had nothing to do with his or her own personal decisions in deliberating the case.

The trial judge chose to believe the jurors' testimony that they had not been prejudiced. Additionally, the trial judge noted that he considered the verdict to be an imminently fair and reasonable one that showed not signs of prejudice. Nevertheless, Fryar asks us to grant him a new trial.

B. The Law.

The constitution, through the due process clause of the fifth amendment and the right to a jury trial enshrined in the sixth and seventh amendments, requires federal courts to give every defendant a fair trial. Haley v. Blue Ridge Transfer Co., 802 F.2d 1532 (4th Cir. 1986). It has been written in even

the most ancient authorities that the constitution guards against even the appearance that prejudice has infected a jury. See Budoff v. Holiday Inns, Inc., 732 F.2d 1523 (6th Cir. 1984) (describing nineteenth-century cases).

Until recently, courts generally agreed that any extrajudicial contact or material reaching the jury presumptively prejudices it. See Haley; United States v. Butler, 822 F.2d 1191 (D.C. Cir. 1987). Under Remme v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954) the party supporting the jury's verdict carried a heavy burden to disprove jury prejudice.[48] See Haley; Butler; United States v. Forrest, 620

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[48] In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror

(Continued on next page)

F.2d 446 (5th Cir. 1980). However, the Supreme Court cast a foreboding shadow on these assumptions when it decided Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

(Continued from previous page)
during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

347 U.S. at 229, 74 S.Ct. at 451 (citations omitted). We have long held that "the integrity of the jury system is no less to be desired in civil cases." United States v. Harry Barfield Co., 359 F.2d 120, 124 (5th Cir. 1966). See also Haley; Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084, 105 S.Ct. 1843, 85 L.Ed.2d 142 (1985); Butler.

There, the Court reversed the Second Circuit's judgment granting a writ of habeas corpus to a New York inmate convicted of murder. Shortly after the state murder trial began, one of the jurors applied to the prosecutor's office for a job in a newly-formed investigative department. The prosecutor himself did not know about the juror's job application until several days into the trial, and thought it too insignificant to tell the judge when he did find out. When the trial judge was informed, he held a hearing to determine whether th juror's contact with the prosecutor's office had biased the juror against the defendant. After hearing testimony from the prosecutor and Smith, the trial judge found "'no evidence' suggesting [the juror bore] 'a sinister or dishonest

motive'"[49] or had been prejudiced.

The defendant, now convicted, eventually petitioned the district court for a writ of habeas corpus. The court granted the writ. 485 F.Supp. 1365 (S.D.N.Y.), aff'd, 632 F.2d 1019 (2d Cir. 1980). Both the district court and the court of appeals held that the trial court should have conclusively presumed prejudice from the facts. 455 U.S. at 214, 102 S.Ct. 16 944.

The Supreme Court reversed, holding that due process requires only that the trial court hold a Remmer hearing to determine whether the juror has been

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[49] 455 U.S. at 214, 102 S.Ct. at 944 (quoting from the trial court's findings in People v. Phillips, 87 Misc.2d 613, 618-19, 384 N.Y.S.2d 906, 910 (1975)).

prejudiced. Citing Remmer, the court wrote,

> This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.

Id. at 215, 102 S.Ct. at 945. Later, the Court added that

> ... due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Where that rule, few trial would be constitutionally acceptable. The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in Remmer and held in this case.

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Id., at 217, 102 S.Ct. at 946 (footnote omitted).

The bondholders argue that Smith v. Phillips overruled Remmer's heavy presumption of juror prejudice. According to the bondholders, Smith v. Phillips requires the party challenging the jury verdict to prove prejudice. Defendants respond that Smith v. Phillips is distinguishable, primarily because it was a habeas challenge to a state trial, not a direct appeal.

Several of our sister circuits already have considered this question squarely. In United States v. Pennell, 737 F.2d 521 (5th Cir. 1984), cert. denied, 469 U.S. 1158, 105 S.Ct. 906, 83 L.Ed.2d 921 (1985), the court concluded that the Remmer presumption had been overrule. There, five jurors received

anonymous, early-morning calls instructing them to convict a criminal defendant. The Sixth Circuit refused to order a new trial because the district judge had held a hearing an determined that the defendant had not proved prejudice.

Pennell, however, has not been accepted in any other circuit, and three circuits have explicitly rejected the argument that the challenging party must prove prejudice.[50] Other cases, while not facing the question directly, have continued to apply the Remmer presumption

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[50] See United States v. Littlefield, 752 F.2d 1429, 1431-32 (9th Cir. 1985) (criticizing Pennell); Haley, 802 F.2d at 1535 (distinguishing Phillips); Butler, 822 F.2d at 1195-96 n. 2 (rejecting Pennell and concluding that "Remmer's allocation of the burden remains the law").

despite Smith v. Phillips.[51] We have applied the Remmer presumption since Smith v. Phillips; however, we have not yet explicitly determined how Smith v. Phillips has affected Remmer. See United States v. Webster, 750 F.2d 307, 336-39 (5th Cir. 1984), cert. denied, 471 U.S. 1106, 105 S.Ct. 2340, 85 L.Ed.2d 856 (1985). Webster does not explicitly take account of Smith v. Phillips. Moreover, it specifies that where outside influence on the jury is alleged, "a presumption of prejudice arises," and it is incumbent

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[51] See, e.g., Owen v. Duckworth, 727 F.2d 543 (7th Cir. 1984); United States v. Delaney, 732 F.2d 639, 543 (8th Cir. 1984); United States v. Hines, 595 F.2d 722, 730-31 (10th Cir. 1982); Hobson v. Wilson, 737 F.2d 1, 47-49 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084, 105 S.ct. 1843, 85 L.Ed.2d 142 (1985) (civil case).

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upon the government to rebut that presumption at a hearing. 750 F.2d at 338.

We do not find this dictum in Webster to be controlling here. It is not evident that the panel was cognizant of the new standard, suggested in Smith v. Phillips, that no longer assumes jury prejudice. Further, Webster noted that "we do not find it necessary to decide if a presumption of prejudice should be applied in all cases of this nature." Id. at 339.

More importantly, and irrespective of the question of who must carry the burden, it is evident here that the trial court properly conducted a hearing, with jurors, that satisfies the requirements of both Smith v. Phillips and Webster. Smith v. Phillips requires

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a "hearing in which the defendant has the opportunity to prove actual bias." 455 U.S. at 215, 102 S.Ct. at 945. Quoting Remmer, 347 U.S. at 230, 74 S.Ct. at 451, the Court noted that at the hearing, the trial judge should "'determine the circumstances, the impact thereof upon the juror, and whether or not [they were] prejudicial, in a hearing with all interested parties permitted to participate.'" 455 U.S. at 216, 102 S.Ct. at 945 (emphasis added in Smith v. Phillips). In Webster, the panel noted specifically that "[c]ounsel should be present at any hearing held to assess outside influence on the jury." 750 F.2d at 338 (citing United States v. Forrest, 620 F.2d 446 (5th Cir. 1980)).

In the case which we now review, the district judge amply met these

requirements, examining the jurors[52] separately in two special post-verdict hearings at which all counsel were present. After carefully considering all of the facts available to him, and examining the demeanor of the jurors

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[52] Smith v. Phillips speaks to the propriety of questioning the jurors:

> Respondent correctly notes that determinations made in Remmer-type hearings will frequently turn upon testimony of the juror in question, but errs in contending that such evidence is inherently suspect. AS we said in Dennis v. United States, 339 U.S. 162, 70 S.Ct. 519, 94 L.Ed. 734 (1950), '[o]ne may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter.' Id., at 171, 70 S.ct., at 523. See also United States v. Reid, 12 How. 361, 366, 13 L.Ed. 1023 (1852).

455 U.S. at 217 n. 7, 102 S.Ct. at 946 n.7.

during questioning, he concluded that no prejudice had been established.

It is appropriate here that we respect that determination by the fact-finder. The panel in Webster emphasized the extensive deference that should be accorded the trial judge in assessing juror bias. As in Webster, we "think the trial court did an admirable job of evaluating the extent of prejudice without contributing to the problem by over emphasis. Moreover, we agree with the trial court that the interviews reveal that the jury was still capable of impartiality." Id. at 339. In other words, the trial court had the right to believe the jurors' unanimous testimony that bribery did not affect their verdict.

Even if we were not convinced that

the district court correctly found an absence of jury prejudice here, we would not permit the perpetrator of jury tampering, in a civil proceeding, to reap the rewards of his misdeed by enjoying a new trial.[53] "Our system of justice has not delegated to every reprobate the power to effect a mistrial." United States v. Williams, 737 F.2d 594, 612 (7th Cir. 1984), cert. denied, 470 U.S> 1003, 105 S.Ct. 1354, 84 L.Ed.2d 377 (1985). See also Butler, 822 F.2d at 1196 n. 2 (quoting Williams).

We are mindful that in Forrest, a criminal case, we held that the defendant

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[53] We note that Fryar has been convicted of using Terracina's uncle to offer Terracina a $10,000 bribe. United States v. Fryar, No. CR-87-60027-01 (W.D. La., conviction entered Mar. 14, 1988), appeal docketed, No. 88-4200 (5th Cir. Mar. 14, 1988).

should receive a new trial even though he had tampered with the jury that convicted him. See 620 F.2d at 458-59. However, in Forrest we did not specifically extend the holding to civil proceedings and see no reason to do so now. The liberty interests inherent in a criminal proceedings prove justification for a different result there.

Moreover, equity plays such a central role in our civil jurisprudence that we are loathe to permit civil litigants to view jury tampering as a "heads I win, tails you lose" proposition whereby a party who tampers with the jury might win if he is not caught, and receive a new trial if he is. Accordingly, we hold that Fryar is not entitled to a new trial.

IX. Conclusion.

We REVERSE the judgment against WLJ and Valley Forge. We also DISMISS Valley Forge's appeal as moot to the extent that the appeal challenges the judgment concerning the coverage limits of WLJ's policy.

We REVERSE the district court's judgment against Fryar to the extent it is based upon section 12 of the Securities Act or the LBSL. We also REVERSE the court's judgment awarding damages to the class against Fryar for violating Rule 10b-5, and for violating Louisiana law. We AFFIRM the district court's judgment concerning liability upon the RICO claims against Fryar, and Abell's and Walton's rule 10b-5 claims and non-securities state-law claims against Fryar. Consequently, we also

REVERSE and REMAND the attorneys' fees award against Fryar for redetermination in light of our holdings regarding the liability and non-liability of the various defendants.

We REVERSE and REMAND the damage awards, for redetermination in accordance with the discussion of damages in this opinion. In addition to the ultimate damage award, the court may also award any appropriate judicial interest.

The judgment is AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

App. 279

No. 88-1506

JOE E. FRYAR,

Petitioner

versus

EDWARD C. ABELL, JR., et al

Respondents

July 3, 1989. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of H.J. Inc. v. Northwestern Bell Telephone Company, 492 U.S. _____, 109 S. Ct. 2893, _____ L. Ed. 2d _____ (1989).

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

EDWARD C. ABELL, JR., ET AL.	* CIVIL ACTION
VERSUS	* NO. 84-1786
POTOMAC INSURANCE COMPANY OF ILLINOIS, ET AL.	* SECTION "O"
* * * * * * * * * * * * * * * *	* JUDGE SHAW * MAG. METHVIN

R U L I N G

Now before the Court are two motions: 1) the motion by plaintiffs, Edward C. Abell, Jr., Carey Walton, and the class of purchasers of Westside Habilitation Center Revenue Bonds for Order Upholding Jury Verdict, Readjusting Attorneys' Fee Award, and Recalculating Individual Plaintiffs' Damage Award, and 2) the motion by defendant, Joe E. Fryar, to Dismiss Civil RICO Claims. For the following reasons, the motion by

plaintiffs is GRANTED, and the motion by defendant is DENIED.

The RICO claim. Plaintiffs move for an order upholding the verdict against Fryar on the RICO claims, and defendant moves to dismiss the RICO claims on the bases that the RICO statute is unconstitutionally vague and that the evidence does not support the verdict under the case of H.J. Inc. v. Northwestern Bell Telephone Company, Inc., 492 U.S. _____, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989).

The jury found against Fryar on the civil RICO claims. This Court (on post-trial motions) and the Fifth Circuit upheld the award, finding that the evidence abundantly supported the finding of RICO violations. Abell v. Potomac Ins. Co., 858 F.2d 1104 (5th Cir. 1988).

The Supreme Court's and Fifth Circuit's orders sending the matter back to this Court require a reconsideration of the question in view of H.J. Inc. Fryar v. Abell, 109 S. Ct. 3236, 106 L. Ed. 2d 584 (1989); and Abell v. Potomac Ins. Co., 884 F.2d 196 (5th Cir. 1989). In consideration of the principles enunciated in H.J., this Court still holds that the finding of RICO violations is abundantly supported by the evidence.

H.J. defines a "pattern of racketeering activity" to require a showing of related racketeering predicates amounting to or posing a threat of continued criminal activity. H.J. describes "relatedness" to mean that the acts had the same or similar purposes, results, participants, victims, or methods of commission or otherwise are

interrelated by distinguishing characteristics. The Court agrees with plaintiffs that the relatedness requirement is met because the activities all stem from Westside's bond offer, were directed to a common purpose or goal (to defraud the investors and enrich Fryar) and had the same victims (the plaintiff-bondholders).

Defendant argues that the continuity requirement is not met, and that for this reason plaintiffs' motion should be denied and the civil RICO claims dismissed. The Court finds, however, that the continuity requirement was also satisfied in this case such that no grounds exist for overturning the verdict finding RICO violations. Continuity is established by proving that defendant engaged in "a series of related

predicates extending over a substantial period of time" evidencing a threat of continuity. H.J., 106 L. Ed. 2d at 209. This may be shown by, e.g., establishing that 1) "the related predicates themselves involve a distinct threat of long-term racketeering activity"; (2) "the predicate acts or offenses are part of an ongoing entity's regular way of doing business"; or (3) "the predicates are a regular way of conducting defendant's ongoing legitimate business . . . or of conducting or participating in an ongoing and legitimate RICO 'enterprise.'" H.J., 106 L. Ed. 2d at 210.

Fryar's predicate acts of using the mails to execute his scheme to sell bonds with the intent of defrauding the purchasers spanned at least six years.

As the Fifth Circuit noted, he used the mail to obtain and transmit the application forms for Westside's certificate of need, to help AA and interpose it in the transaction, and to send the land transaction documents to AA; he also caused others to use the mails to transmit sales circulars that erroneously portrayed Fryar as purchasing and pledging $2,000,000 of bonds with his own money, and to cover up the fraud and deceive bondholders into believing AA was performing more obligations than it had actually undertaken. See Abell v. Potomac Ins. Co., 858 F.2d 1104, 1130 (5th Cir. 1988).

Additionally, as specified in plaintiffs' memorandum, there was ample evidence showing related corrupt actions

spanning a longer period of time and extending beyond the Westside Bond issue.

The Court rejects defendant's assertion that only sporadic and isolated actions were shown. On the contrary, the evidence showed numerous related acts of defendant directed towards a substantial number of victims over the course of several years, evidencing a threat of long-term racketeering conduct. Thus the Court holds that the evidence in this case easily satisfies the requirement of "continuity" of defendant's "pattern of racketeering activity" as articulated in H.J..

Additionally, this Court rejects defendant's argument that the RICO statute is unconstitutionally vague. For the foregoing reasons, the Court will uphold the jury verdict as to the RICO

claims and deny the defendant's motion to dismiss the RICO claims.

Attorneys' fees. Plaintiffs also move for entry of an order redetermining the amount of attorneys' fees against Fryar in the amount of $2,359,177.50. This Court awarded $2,567,323.30 in attorneys' fees against Fryar, All American and WLJ. The Fifth Circuit's remand order requires adjustment because WLJ was absolved of liability.

Again the Court agrees with plaintiffs. A review of the fee applications presented to the Court during the extensive post-trial hearing shows that $83,258.35 worth of time was spent on claims against WLJ. At the 2.5 multiplier, subtracting this time yields

a reduction of $208,145.88[1]. Subtracting this amount from the award of $2,567,323.30 leaves $2,359,177.42[2], which the Court finds is an appropriate adjudged fee award. The Court finds that Fryar's argument that the fees should be more drastically reduced or eliminated is without foundation in the record.

Individual plaintiffs' awards. In accordance with the Fifth Circuit's remand order, plaintiffs' final request is that this Court recalculate the damages awarded to the individual plaintiffs, Abell and Walton. Plaintiffs have submitted a detailed account of

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[1] $83,258.35
x 2.5
= $208,145.87(5)

[2] $2,567,323.30
- 208,145.88
=$2,359,177.42

their proposal for recalculation of damages which Fryar does not oppose. The Court adopts plaintiffs' recalculation of damages and will allow securities fraud damages in the amounts of $564.72 for Abell and $1,129.26 for Walton.

Fryar's bankruptcy. The Fifth Circuit also directed this Court to reconsider the appropriate disposition of this matter in light of the bankruptcy proceedings of Joe E. Fryar. Abell, 884 F.2d 196.

The judgment entered by this Court in consolidated no. 89-2802"O" withdrew from the bankruptcy court the sole issue of the amount of the reduction of the judgment, if any, entered in this civil action against Joe E. Fryar (the debtor in Bankruptcy Case no. 89-80595-11). Accordingly, the clerk will be directed

to mail a copy of this ruling to the bankruptcy judge and to the bankruptcy clerk for filing in the appropriate adversary proceedings or bankruptcy case.

In accordance with the foregoing, IT IS ORDERED

that the plaintiff's motion to uphold jury verdict be GRANTED;

that the attorneys' fee award be REDUCED to $2,359,177.42.

that the individual plaintiff's awards be adjusted so that Abell's award is $564.72 and Walton's award is $1,129.26; and

that defendant's action to dismiss civil RICO claims be DENIED.

Plaintiffs' counsel is requested to submit a proposed form of judgment to the Court consistent with the Fifth Circuit

opinion and this ruling within 10 days hereof.

The Clerk of Court is instructed to mail a copy of this Ruling (and the judgment to be entered hereon) to the bankruptcy judge and to the bankruptcy clerk, as this ruling is related to Adversary nos. 89-AP8059 and 89-AP8071 (in Bankruptcy Case no. 89-80595-11).

Lafayette, Louisiana, this 2nd day of August, 1990.

/s/ John M. Shaw
JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

EDWARD C. ABELL, JR., ET AL.	* CIVIL ACTION
	*
	* NO. 84-1786
VERSUS	*
	* SECTION "O"
POTOMAC INSURANCE COMPANY OF ILLINOIS, ET AL.	*
	* JUDGE SHAW
* * * * * * * * * * * * * * * *	* MAG. METHVIN

J U D G M E N T

This action originally having come before the Court and tried before a jury on December 8, 1986, a verdict having been rendered in favor of plaintiffs on February 4, 1987, and judgment thereon having been rendered on February 19, 1987, now comes before the Court upon remand from the United States Court of Appeals for the Fifth Circuit, and the Court having issued a Ruling on August 2, 1990;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiffs, Edward C. Abell, Jr. and Carey Walton, and the class of purchasers of Westside Habilitation Center Revenue Bonds, and against defendant Joe E. Fryar, in the full and true sum of $2,550,000, together with interest thereon from February 19, 1987 until date of payment, together with all costs of the suit and attorneys' fees as set forth below.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff Edward C. Abell, Jr., and against defendant Joe E. Fryar, in the full and true sum of $564.72, together with interest thereon at the rate of 12% from July 5, 1984, the date of judicial demand, until payment,

together with taxable court costs and attorneys' fees as set forth below.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff Carey Walton, and against defendant Joe E. Fryar, in the full and true sum of $1,129.26, together with interest thereon at the rate of 12% from July 5, 1984, the date of judicial demand, until payment, together with taxable court costs and attorneys' fees as set forth below.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of all plaintiffs and against Joe E. Fryar in the full and true sum of $2,359,177.42, representing reasonable attorneys' fees. Of this amount, only $909,177.42 shall be payable to counsel

for plaintiffs and the balance shall be paid to the plaintiffs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of all plaintiffs and against defendant Joe E. Fryar for the full and true sum of $263,743.00, representing costs and expenses of this litigation compensable under the RICO statute but not taxable under 28 U.S.C. 1920.

Lafayette, Louisiana, this 5th day of September, 1990.

ROBERT H. SHEMWELL
CLERK OF COURT, UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF LOUISIANA

By: /s/ Ronald G. Weathers
Deputy Clerk

Approved as to form:

/s/ John M. Shaw
John M. Shaw, United
States District Judge

No. 90-4737

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT

EDWARD C. ABELL, JR., ET AL,
Plaintiffs-Appellees,

v.

POTOMAC INSURANCE COMPANY OF ILLINOIS, et al,

Defendants,

JOE E. FRYAR,
Defendant-Appellant.

November 13, 1991.

Bondholders sued developer for violation of federal and state securities laws, state law fraud, and Racketeer Influenced and Corrupt Organizations act (RICO) violations, alleging that developer fraudulently caused issuance of $13,550,000 in tax-exempt revenue bonds on which developer ultimately defaulted. The United States District Court for the

Western District of Louisiana, John M. Shaw, Chief Judge, entered judgment on jury verdict in favor of bondholders awarding damages and attorney fees. Developer appealed. The Court of Appeals, 858 F.2d 1104, 863 F.2d 882, affirmed in part, reversed in part and remanded. Developer petitioned for certiorari. The United States Supreme Court, 492 U.S. 914, 109 S.Ct. 3236, 106 L.Ed.2d 584, granted certiorari, vacated judgment and remanded. The Court of Appeals, 884 F.2d 196, remanded to the district court. The district court reinstated jury's RICO verdict and reduced attorney fees by the amount of time spent litigating claims against law firm which was absolved of liability. Developer appealed. The Court of Appeals, Emilio M. Garza, Circuit Judge,

held that: (1) RICO statute was not unconstitutionally vague; (2) facts constituted pattern of racketeering activity within meaning of RICO statute; and (3) Court of Appeals was not required to reduce or to eliminate altogether attorney fees awarded to plaintiffs.

Affirmed.

1. Constitutional Law

Racketeer Influenced and Corrupt Organizations

Racketeer Influenced and Corrupt Organizations Act (RICO) was not unconstitutionally vague as applied to defendant, who over period of more than six years engaged in fraudulent conduct involving more than 500 victims in scheme for selling bonds in order to finance home for mentally retarded and

emotionally disturbed patients. 18 U.S.C.A. §§ 1961 et seq., 1961(5); U.S.C.A. Const.Amend. 5.

2. Racketeer Influenced and Corrupt Organizations

Defendant's mail fraud violations and fact that they were strung together by objective of making money at expense of bondholders were sufficient to satisfy continuity and relatedness requirements of Racketeer Influenced and Corrupt Organizations Act (RICO) pattern. 18 U.S.C.A. § 1961(5).

3. Federal Civil Procedure

Court of Appeals was required to deduct from attorney fees awarded to plaintiffs only those fees incurred solely in developing claims against law firm which was absolved of liability in

action alleging securities fraud and violations of Racketeer Influenced and Corrupt Organizations Act (RICO), and no reduction of fees was required for time spent on unsuccessful issues which was difficult to segregate. 18 U.S.C.A. § 1961 et seq.

Appeal from the United States District Court for the Western District of Louisiana.

Before KING, JOHNSON, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Defendant-appellant Joe Fryar appeals the district court's judgment, which rejected his argument that the RICO statute is unconstitutionally vague and readjusted the amount of attorneys fees

awarded to plaintiffs by $83,258.35. We Affirm.

I. BACKGROUND

A. Facts

This court has already narrated the complicated facts of this case.[1] The following is a summary of the facts material to this appeal.

Westside Habilitation Center, Inc. ("Westside") is an alleged non-profit corporation based in Cheneyville, Louisiana. According to its developer and creator, Joe Fryar, Westside was conceived to be a home for the mentally retarded and actually became a home to

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[1] See Abell v. Potomac Ins. Co., 858 F.2d 1104, 1109-13 (5th Cir. 1988), cert. granted and judgment vacated, 492 U.S. 914, 109 S.Ct. 3236, 106 L.Ed.2d 584 (1989).

severely mentally and emotionally-disturbed patients. Westside also became the means by which Fryar made lots of money.

On January 3, 1978, Fryar purchased 6.47 acres of land for the sum of $100,000-the land's appraised value. Fryar then incorporated Westside in 1979. Although a five-member board of directors was appointed, Fryar continued to control Westside and made all of its decisions.

Fryar began Westside with no capital assets; Westside's sole source of revenue and assets was the sale of bonds. According to Fryar's plan, once established, Westside would rely on revenues paid by the State of Louisiana Medicaid program to finance operating expenses and retire these outstanding bonds.

To market his bonds and raise the needed capital, Fryar hired the nationally-known firm of Booz, Allen & Hamilton, Inc. ("B & A") to prepare a financial feasibility report for Westside. B & A did not reach the conclusions Fryar desired; their report raised several areas of concern.[2] Although Fryar did respond to B & A's report by changing his targeted clientele from mentally-retarded to emotionally-

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[2] B & A's report highlighted: (1) the possibility that the state medicaid program would impose ceilings on medicaid reimbursements; (2) the difficulties Westside would encounter in retiring its debt, since it depended entirely upon medicaid reimbursements and lacked adequate sources of working capital; and (3) the inherent faults of the Westside concept in a state whose prevailing policies required placing Westside's potential patients in group homes. 858 F.2d at 1110.

disturbed and mentally-retarded patients, Fryar also threatened B & A with a lawsuit because of their adverse conclusions. Confronted with the possibility of being sued, B & A did agree to sign a letter prepared by Westside's bond counsel, but Fryar was still left without a favorable feasibility report. Fryar ultimately procured a favorable report by retaining Real Estate Research Corporation, a firm primarily experienced in appraising real estate.

Despite Fryar's success in obtaining a favorable feasibility report, the Louisiana State Bond Commission declined to approve financing for Westside bonds. But Fryar again persisted and he eventually convinced the Town of Cheneyville to back a $12,850,000

municipal bond issue. Mysteriously, that bond authorization was later enhanced to $13,550,000.

So preparation of an offering statement for the sale of bonds began. Fryar now relied upon a number of professionals responsible for preparing the Westside bonds for market, including Wright, Lindsey & Jennings ("WLJ"), a Little Rock, Arkansas law firm.[3] WLJ prepared the bond offering and assumed

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[3] Fryar also relied upon: Joseph Hancock and his underwriting firm, Hancock, Joseph & Daniels; Skye, Westside's attorney; Peck, whose firm of Peck, Shaffer & Williams continued to serve as bond counsel; Robert Sheddy of Swink & Co., the other underwriters for the bond issue; and Mintz, Levin, Cohn, Ferris, Glovsky & Popeo--a Boston law firm that was then counsel for the two underwriters. Mintz, Levin resigned as underwriter's counsel just a few weeks before Westside's scheduled closing of its bond deal with the underwriters, and the underwriters immediately hired WLJ.

strict "due diligence" duties; WLJ was responsible for carefully reviewing the final offering statement and for interviewing all key participants in the bond transaction. WLJ did not adequately investigate the bond transaction and failed to uncover details of how Westside acquired its facilities--the layered transaction responsible for this multi-million-dollar litigation;

(i) in 1978, Fryar bought the land eventually used to establish Westside for $100,000 ("the land");

(ii) in 1981, Fryar helped to create All American, a Bermuda corporation controlled by Fryar;

(iii) also in 1981, Fryar then sold the Land to All American for $150,000, making an immediate 50-

percent profit after owning the Land for three years;

(iv) in 1982, All American sold the Land to Westside for $2,479,000 (more than fifteen times what All American originally paid)--$479,000 in cash and the remaining $2,000,000 in tax-exempt municipal Westside bonds; and

(v) All American retained its ownership interest in the bonds but allowed Fryar to pledge them as security for his performance of duties as developer of Westside--enabling Fryar to later claim that he had over $2,000,000 of his own money at risk in Westside.

The offering statement WLJ prepared contained no information regarding the B & A report, contained no mention of the

fact that Fryar had once owned the Land, and flatly reported that Fryar had pledged $2,000,000 of Westside bonds to the project's success--suggesting that Fryar had pledged his own money.

Westside and its underwriters closed their bond deal on April 20, 1982. The underwriters subscribed to the entire issue of bonds and undertook the task of selling, which they did quickly and without difficulty.

Then the facts began to publicly surface. A local newspaper caught wind of the Land transaction, began to dig, and further unearthed its details. Also, a bank failure and delays cost Westside some $300,000, and resulting litigation forced Swink & Co., the underwriter for the bond issue, to send a reassuring letter to all bondholders. That letter,

dated January 20, 1983, finally revealed information wrongfully withheld from the offering statement.

This lawsuit was initiated on behalf of a class of 500 Westside bondholders on July 5, 1984. In October, Westside's financial structure crumbled: Westside defaulted on an interest payment on its bonds and in March of 1985 was forced to file Chapter XI bankruptcy.

The Bondholders did not fare well in bankruptcy and are now entitled to interest payments considerably lower than promised. As of December 8, 1986, the time this case first went to trial, All American had made $2,950,000 from the land transaction and interest payments it received from Westside bonds; the

bondholders had lost more than $12,000,000.[4]

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[4] According to plaintiffs, related transactions also enhanced Fryar's wealth at the bondholders' expense:

> [Fryar] submitted reimbursement claims to the State of Louisiana Medicaid program which misrepresented the true cost of the facility, the obligations of Westside and the fact that the bondholders were not being paid the interest owed. As a result of these misrepresentations, Fryar received payments from the state of Louisiana Medicaid program substantially in excess of what should have been paid. More importantly, Fryar pocketed the money paid as reimbursement on debts to the bondholders, thereby profiting personally by an amount in excess of $1,300,000.

Brief of Appellees Edward C. Abell, Jr. and Carey Walton, Individually, and as Representatives of the Class of Purchasers of Westside Habilitation Center Revenue Bonds at 16-17, Abell v. Potomac Ins. Co. of Ill, No. 90-4737 (filed Apr. 30, 1991) ["Appellees' Brief"].

B. Proceedings

This action was commenced on July 5, 1984, by Edward C. Abell, Jr. and Carey Walton, individually and on behalf of the class of purchasers of Westside bonds, for (i) violations of federal and state securities laws, (ii) state law fraud, and (iii) RICO.[5] According to plaintiffs, Fryar fraudulently caused Westside to issue $13,550,000 in tax-exempt revenue bonds, which ultimately defaulted and inflicted millions of

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[5] More specifically, plaintiffs invoked section 12 of the Securities Act of 1933, 15 U.S.C. § 771(1), (2); section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); Rule 10b-5, 17 C.F.R. § 240.10b-5; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68; the Louisiana Securities Law, La.Rev.Stat. Ann. § 51:714 (West 1987); and provisions of Louisiana substantive law regarding fraud, breach of fiduciary duty, and negligent misrepresentation.

dollars in losses on bondholders. Following a nine week trial, a jury returned a verdict for plaintiffs on all counts, and judgment was entered on February 19, 1987. The jury awarded plaintiffs $12,096,866.80 in damages, including $2,550,000 for RICO violations and $2,567,323.80 for attorneys' fees.

On appeal, this court affirmed the district court's judgment on plaintiffs' RICO claims and affirmed the RICO award in favor of plaintiffs, holding that "the jury awarded plaintiffs considerably less than the damages which they proved at trial."[6] This court did, however, order

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[6] Abell, 858 F.2d at 1140. This court actually affirmed the district court in part, reversed in part, and remanded by holding that:

(1) bond counsel and person whose corporation issued the bonds were not "sellers" for purposes of the Securities Act or the Louisiana Blue

the district court to readjust the attorneys fees award to compensate plaintiffs only for the legal resources which they expended to develop a case against Fryar and All American.

Fryar filed a Petition for Certiorari to the United States Supreme Court on March 13, 1989, arguing that

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(Continued from previous page)

Sky law; (2) statements were shown to be material; (3) plaintiffs could not use Ute presumption of fraud on the market theory to show reliance by class; (4) plaintiffs did not show any reliance on statements made by bond counsel; (5) bond counsel could not be held liable on breach of fiduciary duty or other theories with respect to nonclients; (6) attorneys were not vicariously liable; (7) plaintiffs established RICO violation by developer whose corporation issued the bonds; (8) plaintiffs were not limited to out-of-pocket damages; and (9) developer did not show that he was prejudiced by jury's knowledge of his attempt to bribe one juror.

Id. at 1104.

plaintiffs had failed to establish distinct multiple schemes and that they had, therefore, failed to establish a pattern of racketeering activity. On July 3, 1989, the United States Supreme Court granted petitions for certiorari in nine cases, including this one, in which the issue of sufficiency of a pattern of racketeering activity was raised.[7] In light of the Supreme Court's decision discussing the appropriate standard for establishing a pattern of racketeering activity under RICO,[8] the Court systematically remanded the nine cases on this issue decided prior to H.J. for reconsideration.

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[7] See Fryar v. Abell, 492 U.S. 914, 109 S.Ct. 3236, 106 L.Ed.2d 584 (1989).

[8] See H.J. Inc. v. Northwestern Bell Tel. Co., Inc., 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989).

On September 12, 1989, this court then remanded the matter back down to the district court for further consideration in light of H.J. and Fryar's pending bankruptcy proceeding.[9] Plaintiffs moved for reinstatement of the jury's RICO verdict and the award of attorneys' fees, and Fryar moved to dismiss plaintiffs' RICO claims, arguing for the first time that the RICO statute is unconstitutionally vague.

The district court granted plaintiffs' motion, upholding the jury's verdict in light of H.J. and rejecting Fryar's argument that RICO is

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[9] See Abell v. Potomac Ins. Co., 884 F.2d 196 (5th Cir. 1989); In re Joe E. Fryar, Docket Number 89-BK-80595-11 (Bankr.W.D.La. 1989).

unconstitutionally vague.'[10] In accordance with this court's instruction, the district court readjusted the amount of attorneys' fees awarded plaintiffs, reducing the award to $2,359,177.42; the district court concluded that $83,258.35 worth of time was spent litigating claims against the law firm of Wright, Lindsey & Jennings ("WLJ"), which this Court absolved of liability.

Judgment was entered on September 5, 1990, reaffirming the jury's RICO verdict and entering the adjusted award of attorneys' fees. It is from this judgment that Fryar now appeals.

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[10] See Abell v. Potomac Ins. Co., No. 84-1786, Ruling at 1-5 (W.D.La. Aug. 2, 1990) ["Ruling"].

II. DISCUSSION

This case is before us once again for reconsideration in light of H.J.--the Supreme Court's effort to walk onto a site of interpretive confusion and construct a standard for establishing what constitutes a "pattern of racketeering activity" under RICO. See generally H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). In H.J., where customers of a telephone company alleged that the company had been bribing state officials to gain approval for excessive telephone rates, the Court reversed the district court's judgment granting defendants motion to dismiss. The Court held that "RICO defines bribery as a 'racketeering activity,' 18 U.S.C. § 1961(1), so petitioners have[,as required

under RICO,] alleged multiple predicate acts", and the Court reversed the district court on the ground that "petitioners may be able to prove that the multiple predicates alleged constitute 'a pattern of racketeering activity,' in that they satisfy the requirements of relationship and continuity." Id. at 250, 109 S.Ct. at 2906 (emphasis added). Beyond showing the commission of at least two predicate offenses on a specific list,'' H.J.'s prescription for a "pattern of racketeering activity" calls for a showing "that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal

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'' This list has been codified at 18 U.S.C.A. §§ 1961(1), (5) (1984 & Supp. 1991).

activity." Id. at 239, 109 S.Ct. at 2900 (emphasis in original).

Along with these relatedness and continuity requirements, the Court introduced tests to establish their presence. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1412-13 (3rd Cir. 1991). For relatedness, the Court adopted a broad multi-factor test that turns on whether the alleged predicate acts "'are interrelated by distinguishing characteristics and are not isolated events.'" H.J., 492 U.S. at 240, 109 S.Ct. at 2901 (quotation omitted). As for continuity, the Court noted that proof of multiple schemes is "highly relevant" to the question of continuity but not a prerequisite,[12] and

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[12] See id. 492 U.S. at 240, 109 S.Ct. at 2901.

defined continuity as "referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." Id. at 241, 109 S.Ct. at 2902. As was recognized by the Court, these tests are highly fact- and case-specific. See id. at 237, 242, 109 S.Ct. at 2899, 2902, Kehr Packages, 926 F.2d at 1412-13.

Exercising the opportunity provided by H.J., appellants have returned to this court with three questions of law in hand: (a) whether the provisions of the RICO statute, 18 U.S.C. §§ 1961, et seq., and in particular 18 U.S.C. § 1961(5), are unconstitutionally vague in violation of the procedural due process guarantees of the U.S. Const. amend. V; (b) alternatively, whether the uncontested

facts in this case constitute proof of "a pattern of racketeering activity" within the meaning of the RICO statute an interpreted and applied; and (c) whether this court should substantially reduce or eliminate altogether the attorneys' fees awarded plaintiffs. To fully address these questions, we will consider each of them individually.

A. Fryar's Constitutional Challenge

[1] When we remanded this case to the district court for consideration, we did so with an explicit mandate: "This cause is REMANDED to the district court for further consideration in light of H.J. Inc. The district court shall also consider the appropriate disposition of

this matter in light of the pending bankruptcy proceeding."[13] We did not lower a pinata of issues for Fryar to split open, returning to this court with his arms full.

The H.J. opinion scripted by Justice Brennan and delivered by the Court is actually an effort to overcome RICO ambiguity--and, therefore, add constitutional undergirding to the statute--by establishing a "pattern of racketeering activity" standard for RICO. See generally H.J., 492 U.S. at 229, 109 S.Ct. at 2893. Fryar has not constructed his constitutional challenge to RICO from the holdings of H.J. Rather, he has pulled his argument out of the H.J. concurrence of Justice Scalia, from which

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[13] Abell, 884 F.2d 196.

he quotes in his brief at length.[14] See e.g., Original Brief of Defendant-Appellant Joe E. Fryar at 19-21, Abell v. Fryar, No. 90-4737 (5th Cir. filed Apr. 1, 1991) ["Appellant's Brief"]. The gist of Justice Scalia's concurrence is captured in the following excerpt:

> Today, four years and countless millions in damages and attorneys' fees later (not to mention prison sentences under the criminal provisions of

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[14] Fryar is certainly not the first to raise a vagueness challenge to RICO with citations to Justice Scalia's concurrence; others have also tried and failed. See, e.g., United States v. Glecier, 923 F.2d 496, 497 n. 1 (7th Cir. 1991); United States v. Coiro, 922 F.2d 1008, 1017 (2d Cir. 1991); United States v. Pungitore, 910 F.2d 1084, 1104-05 (3d Cir. 1990); United States v. Angiulo, 897 F.2d 1169, 1179-80 (1st Cir. 1990), cert. denied, ____ U.S. ____, 111 S.Ct. 130, 112 L.Ed.2d 98 (1990).

RICO), the Court does little more than repromulgate those hints as to what RICO means, though with the caveat that Congress intended that they be applied using a "flexible approach."

* * * * *

Today's opinion has added nothing to improve our prior guidance, which has created a kaleidoscope of circuit positions, except to clarify that RICO may in addition be violated when there is a "threat of continuity." It seems to me this increases rather than removes the vagueness.

H.J. 492 U.S. at 251, 255, 109 S.Ct. at 2907, 2908 (quoted in Appellant's Brief at 20-21).

The force of Justice Scalia's concurrence and the fact that it was joined by the Chief of Justice and Justices O'Connor and Kennedy--all currently members of a Court that has changed its composition since deciding H.J.--do add a thick coat of lacquer to appellant's argument. Nevertheless, the scope of the Supreme Court's remand is narrow and we only proceed to the outer edge of the Court's H.J. holdings--despite the efforts of appellant to entice us beyond. See Robinson v. Ariyoshi, 854 F.2d 1189 (9th Cir. 1988). Cautiously aware that we are standing on that edge, we now consider Fryar's constitutional contention.

First, this court cannot simply overlook the fact that Fryar has waited six years after the commencement of this case, four years after a nine-week jury trial resulting in a jury verdict in favor of plaintiffs, and two and one-half years after this court affirmed the judgment on plaintiffs' RICO claims to launch his constitutional attack on the RICO statute. Justice Scalia's concurrence did not create the alleged constitutional problems with RICO, and the Supreme Court did not pull H.J. out of a jurisprudential vacuum.[15] "Untimely" is, therefore an understatement. See Minpeco, S.A. v.

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[15] In fact, the Court constructed H.J. from a bulky body of case law discussing the elements necessary to establish RICO liability--including the continuity requirement. See, e.g., Sedima, S.P.R.L. v. Imrex Co., Inc., 473

Hunt, 724 F.Supp. 259, 260 (S.D.N.Y. 1989) (defendants criticized for first

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U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) (discussing elements regarding "pattern of racketeering activity."); United States v. Indelicato, 865 F.2d 1370 (2d Cir. 1989) (en banc) (rejecting multiple scheme requirement; two or more interrelated acts with showing of continuity or threat of continuity is sufficient), cert. denied, _____ U.S. _____, 110 S.Ct. 56, 107 L.Ed.2d 24 (1989); United States v. Jennings, 842 F.2d 159 (6th Cir. 1988) (two predicate acts are potentially enough); Barticheck v. Fidelity Union Bank/First National State, 832 F.2d 36 (3d Cir. 1987) (rejecting multiple scheme requirement: adopting case-by-case multifactor test); Sun Sav. and Loan Ass'n. v. Dierdorff, 825 F.2d 187 (9th Cir. 1987) (requiring two predicates, separate in time, which are not isolated events; Roeder v. Alpha Indus, 814 F.2d 22, 30 (1st Cir. 1987) (to establish "pattern", not enough that racketeering acts constitute two or more: "The constituent elements must be sufficiently related to one another and threaten to be more than an isolated occurrence"); Torwest DBC Inc. v. Dick, 810 F.2d 925 (10th Cir. 1987) (holding single-objective scheme with no threat of continuity insufficient); Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross &

asserting constitutional challenge to trial motions).[16]

Still, let us take one step more and consider the substance of Fryar's constitutional challenge. Fryar notes that a statute is unconstitutionally vague when it "either forbids or requires

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Co., 782 F.2d 966 (11th Cir. 1986) (requiring that predicates be interrelated).

[16] The facts in Minpeco, S.A. v. Hunt, 724 F.Supp. 259, 260 (S.D.N.Y. 1989), are precisely on point with the facts before us. Consider that court's holding:

> [I]n spite of the interest created in the legal profession by the challenging remarks contained in Justice Scalia's concurrence, and although he spoke for three other Justices, his concurrence does not constitute a formal development of the law which would justify declaring the statute unconstitutional at this stage of the exhaustive proceedings in this case.

Id. at 260.

the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application,"[17] and goes on to argue that:

> Certainly, if the justices of the Supreme Court, the circuit judges sitting on the various Courts of Appeals and the district court judges are unable to discern the meaning of "pattern of racketeering activity" from 18 U.S.C. §§ 1961, et seq., then men of common intelligence must necessarily guess as its meaning and differ as to its application.

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[17] Connally v. General Constr. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); see also Appellant's Brief at 19.

Appellant's Brief at 22.[18]

In bringing his constitutional contention to us, Fryar is apparently overlooking the principle that "outside the First Amendment context, a party has standing to raise a vagueness challenge only insofar as the statute is vague as applied to his or her specific conduct." United States v. Pungitore, 910 F.2d 1084, 1104 (3d Cir. 1990), cert. denied, _____ U.S. _____, 111 S.Ct. 2010, 114

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[18] More specifically, Fryar argues that:

> Clearly, 18 U.S.C. § 1961(5) does not set forth a definition or notice of what constitutes a "pattern of racketeering activity." Instead, the statute only sets forth a minimum necessary condition for the existence of such a pattern. 18 U.S.C. §§ 1961, et seq., does not contain any other provision relating to the essential element of a "pattern of racketeering activity."

Appellant's Brief at 11 (emphasis in original).

L.Ed.2d 98 (1991); see also United States v. Angiulo, 897 F.2d 1169, 1179 (1st Cir. 1990) (in absence of First Amendment considerations, vagueness challenge must be examined in light of a case's particular facts), cert. denied, _____ U.S. _____, 111 S.Ct. 130, 112 L.Ed.2d 98 (1990). For his vagueness challenge to succeed, Fryar would have had to show this Court that the scope of RICO's "pattern" element was so unclear that a person of ordinary intelligence in Fryar's position would not have had adequate notice that his actions constituted a "pattern of racketeering activity." See id. at 1179. A myriad of fraudulent conduct spanning more than six years and involving more than five hundred victims--based on the evidence adduced at trial, it follows that Fryar's

facial attack on the constitutionality of RICO is simply too superficial to accept.[19]

B. Fryar's Nonconstitutional RICO Challenge: The Question of Continuity

[2] A "Pattern of racketeering activity" is a necessary element for establishing the "prohibited activities" that trigger RICO liability. See 18 U.S.C.A. §§ 1961, 1961(5) (1984 & Supp. 1991). As noted by Justice Scalia, it is

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[19] See generally Abell v. Potomac Inc. Co., 858 F.2d 1104, 1109-13 (5th Cir. 1988); id. at 1130:

> Here, plaintiffs alleged that Fryar had repeatedly used the mails to execute a scheme to sell Westside bonds with the intent of defrauding the purchasers. The record amply supports the jury's conclusion that Fryar, intending to defraud potential investors, devised and employed a scheme to sell Westside bonds. Fryar knowingly misled prospective bondholders about a land transaction that significantly affected Westside's financial

also the cause of "the widest and most persistent circuit split on an issue of federal law in recent memory." H.J., 492 U.S. at 251, 109 S.Ct. at 2906-07.

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structure. He falsely suggested that he had backed the health-care project with $2,000,000 of his own money. Obviously, the jury could find that Fryar had a reasonably calculated plan to deceive persons of ordinary prudence and comprehension into giving Westside their money.

Nor does Fryar contest whether he used the mails repeatedly to execute this scheme; indeed, the evidence is overwhelming that he did. Fryar used the mails to obtain and transmit the application forms for Westside's certificate of need; to help create All American and interpose it in the transaction; and to send the land transaction documents to All American. He also caused others to use the mails to transmit the sales circulars that erroneously portrayed Fryar as purchasing and pledging $2,000,000 of bonds with his own money; and finally, he caused the mails to be used in an attempt to cover up the

Although our opinion has been vacated by the Court's systematic remand of nine cases on the issue now again before us, this court has already affirmed the judgment for plaintiffs' RICO claims against Fryar for the activities in question, noting that "the evidence strongly supports the jury's RICO verdict." 858 F.2d at 1130 (emphasis added). H.J. has, if anything, resolved rather than revolutionized the law, and the Fryar facts have not changed.[20]

(Continued from previous page)

fraud and deceive bondholders into believing All American was performing more obligations than it had actually undertaken. Thus, the evidence strongly supports the jury's RICO verdict.

[20] See supra notes 15 and 19.

RICO defines mail fraud as a "racketeering activity."[21] Mail was the means by which Mr. Fryar, among other things, carried out his infamous land transaction.[22] For example, in 1981 and 1982, the mails were used to (i) create All American, (ii) set up All American as the purchaser of Fryar's land, (iii) carry out a sale of that land to Westside for fifteen times what All American originally paid for it, and (iv) to transmit sales circulars that deceptively portrayed Fryar as purchasing and pledging $2,000,000 in bonds paid for with his own money.

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[21] 18 U.S.C.A. section 1961(1)(B) (1984 & Supp. 1991) states that "'racketeering activity' means any act which is indictable under any of the following provisions of title 18, United States Code ... section 1341 (relating to mail fraud)."

[22] Discussed supra at Part I.A.

The essence of the Court's H.J. holding is that:

> RICO legislative history ... establishes that Congress intended that to prove a "pattern of racketeering activity" a plaintiff or prosecutor show both "relationship" and "continuity"--that the racketeering predicates are related, and that they either constitute or threaten long-term criminal activity.

492 U.S. at 230, 109 S.Ct. at 2896 (citation omitted). According to Fryar, rather than being related and continuous, his criminal acts were isolated and

sporadic.[23] The district court, applying the principles of H.J. disagreed:

> The Court agrees with plaintiffs that the relatedness requirement is met because the activities all stem from Westside's bond offer were directed to a common purpose or goal (to defraud the investors and enrich Fryar) and had the same victims (the plaintiff-bond holders).
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> * * * * * *

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[23] Appellant's Brief at 23:
In particular, plaintiffs failed to produce any evidence of racketeering activities engaged in by defendant that amounted to or threatened long-term criminal activity, i.e., the "continuity" requirement for proving the existence of a "pattern of racketeering activity." Instead, plaintiffs were only able to show that appellant Fryar engaged in isolated and sporadic criminal acts related to the Westside bond offer.

> Continuity is established by proving that defendant engaged in "a series of related predicates extending over a substantial period of time" evidencing a threat of continuity. This may be shown by, e.g., establishing that (1) "the related predicates themselves involve a distinct threat of long-term racketeering activity"; (2) "the predicate acts or offenses are part of an ongoing entity's regular way of doing business"; or (3) "the predicates are a regular way of conducting or participating in an ongoing and legitimate RICO 'enterprise.'"

Ruling at 2-3, quoting H.J., 492 U.S. at 229, 109 S.Ct. at 2893 (citations omitted); see also Kehr Packages, Inc. v.

Fidelcor, Inc., 926 F.2d 1406, 1412-13 (3d Cir. 1991) (discussing how to satisfy tests for establishing relatedness and continuity).

H.J.'s relatedness and continuity tests are fact-specific,[24] and the facts adduced at trial and piled up high against Fryar--some 500 bondholders cheated out of millions of dollars in a scheme that spread itself out over more than six years--are damning. We have no need to sharpen our pencils for subtle RICO analysis: Fryar's mail fraud violations and the fact that these violations were, as observed by the district court, strung together by the making-money-at-the-expense-of-

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[24] See id. 492 U.S. at 237, 242, 109 S.Ct. at 2899, 2902; Kehr Packages, 926 F.2d at 1412-13.

bondholders objective realized by Fryar are enough. Fryar's conduct has, therefore, easily surpassed the RICO threshold, and we affirm the district court's RICO judgment against him.

C. The Question of Attorneys' Fees

[3] In our opinion vacated by the Supreme Court, we absolved the law firm of WLJ of liability and ordered the district court to compensate plaintiffs only for legal resources expended to develop their case against Fryar and All American.[25] The district court obliged, reducing the attorneys' fees awarded against Fryar by $83,258.35.[26] Now Fryar asks us to do that again, pleading "that

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[25] See 858 F.2d at 1142.

[26] Ruling at 4-6 (reduction based upon review of fee applications numbering 143 pages and reflecting thousands of individual work entries).

the district court did not delineate and differentiate the professional activities of plaintiffs' counsel as to all of the defendants..."[27]

Where time spent on unsuccessful issues is difficult to segregate, no reduction of fees is required. See Riverside v. Rivera, 477 U.S. 561, 569-74, 106 S.Ct. 2686, 2691-93, 91 L.Ed.2d 466 (1986); Hensley v. Eckerhart, 461 U.S. 424, 435, 103 S.Ct. 1933, 1940, 76 L.Ed.2d 40 (1983). Therefore, we only need deduct for fees incurred solely in developing claims against WLJ.

Having thoroughly reviewed the record, we agree with appellees:

> little time was spent solely developing claims against WLJ for

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[27] Appellant's Brief at 35.

> trial. With the exception of the legal malpractice claim, the same claims asserted against WLJ were asserted against Fryar.... Even if WLJ had not been a defendant, proof of its involvement nevertheless was required to rebut defenses of reliance on counsel and that the loss resulted from the actions of others.[28]

Fryar has already received a significant reduction in the attorneys' fees awarded against him. Had he substantiated that a larger portion of the legal fees incurred by plaintiffs were spent on developing claims solely against defendant WLJ, Fryar would probably have received a

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[28] Appellees' Brief at 42.

greater reduction.[29] In the absence of such substantiation, we affirm the judgment of the district court.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[29] The brief Fryar submitted to this court is, to say the least, thin on this point. The most he has to offer us is that the case began with 12 defendants and "[a]t trial appellant Fryar, Wright, Lindsey & Jennings and All American Service Company, Ltd. remained as defendants, plaintiffs having settled by compromise their claims against the other defendants." Appellants Brief at 32-35. This is simply not enough to raise reservations regarding the district court's determination.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 90-4737

EDWARD C. ABELL, JR., ET AL

Plaintiffs-Appellees,

versus

POTOMAC INSURANCE COMPANY OF ILLINOIS, ET AL.,

Defendants,

JOE E. FRYAR,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

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ON PETITION FOR REHEARING

(DECEMBER 11, 1991)

Before KING, JOHNSON and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE DIVISION

EDWARD C. ABELL, JR. AND CAREY WALTON, PLAINTIFFS	*	CIVIL ACTION
	*	CV84-1786
VERSUS	*	NO. _____
POTOMAC INSURANCE COMPANY OF ILLINOIS, NATIONAL UNION FIRE INSURANCE COMPANY, JOE E. FRYAR, HANCOCK, JOSEPH & DANIELS, JOSEPH HANCOCK, SWINK & CO., INC., WILLIAM E. SKYE, JOHN W. PECK, PECK SHAFFER & WILLIAMS, WRIGHT, LINDSEY & JENNINGS, ABC INSURANCE COMPANY, and RODNEY KENDRICK, DEFENDANTS	*	SECTION _____
	*	MAGISTRATE DIV. _____
	*	JURY TRIAL DEMANDED

COMPLAINT IN A CLASS ACTION UNDER THE SECURITIES ACT OF 1933, THE SECURITIES EXCHANGE ACT OF 1934, RACKETEER INFLUENCED AND CORRUPT ORGANIZATION ACT, THE LOUISIANA BLUE LAW AND OTHER LAWS

(Filed July 5, 1984)

* * *

GENERAL ALLEGATIONS

13. Commencing during or prior to the year 1976, and continuing through and including 1982, the Fryar Group, the Hancock Group, and Skye embarked upon a scheme and a pattern of racketeering activity for the purpose of enriching themselves by and through the issuance and offering to the public of revenue bonds, the proceeds of which were to be issued to construct an intermediate care facility for the mentally retarded.

* * *

15. Pursuant to the scheme, Fryar and Charles S. Bollinger ("Bollinger") purchased approximately 6.47 acres of land, including a vacant school building, in Cheneyville, Louisiana (hereinafter referred to as the "Cheneyville Property"), from the Rapides Parish

School Board on or about January 3, 1978 for the sum of $100,000. On or about August 16, 1979, Fryar purchased Bollinger's interest in the above-described property by assuming a mortgage on the land and building.

* * *

18. During the summer of 1981, the Fryar Group, the Hancock Group and Skye began to finalize their scheme to issue to the Bonds to finance the acquisition and construction of Westside. Toward that end, Peck, PSW, and WLJ, were retained to act as bond counsel and as counsel to the underwriters. In addition, Swink was retained, together with HJD, to underwrite the issuance.

19. During the late summer or fall of 1981, the Fryar Group, the Hancock Group and Skye caused a consulting firm

to conduct a market and feasibility study concerning Westside (the "Feasibility Study"). On information and belief, the results of the Feasibility Study were unfavorable.

* * *

22. Notwithstanding the opposition to Westside and the adverse results of the Feasibility Study, the defendants agreed to proceed with the scheme to market the Bonds. Toward that end, defendants agreed that Westside, Inc. would issue to the public $13,550,000 of revenue bonds through sale of the Bonds at a substantial discount to HJD and Swink, which in turn, would resell the Bonds to the public at face value. HJD and Swink were to receive a profit exceeding $1,000,000 from the initial sale to the public.

* * *

24. To conceal the scheme to have Westside purchase for $2,459,700 the same Cheneyville Property acquired by Fryar for a substantially lesser sum, Fryar, assisted by Skye (who drafted and notarized the relevant documents for the transaction, including the act of sale), Hancock, Kendrick and others, sold the property for $150,000 in late 1981 to All American Service Company, Ltd., also doing business as AA Service Company, Ltd. ("All American"), a Bermuda corporation. Payment to Fryar of the $150,000 purchase price by All American was conditioned upon the subsequent sale of the Cheneyville Property to Westside for $2,459,700.

* * *

27. In accordance with the general scheme, the Bonds were to be issued by Westside, Inc. pursuant to an indenture of trust (the "Indenture") between Westside, Inc. and a corporate trustee (the "Trustee"). Fryar was then to enter into a development agreement with Westside, Inc. (the "Development Agreement"), providing for the construction of the Westside facility on the Cheneyville Property for a cost in excess of $5,000,000. Fryar individually was to receive fees in excess of $900,000 under the Development Agreement.

* * *

30. To conceal the transaction whereby Fryar would purchase the $2 million of Bonds with the profit received from the sale to Westside of the Cheneyville Property, the defendants

caused the ownership of the $2 million dollars of Bonds to be registered in the name of All American.

* * *

38. In connection with the solicitation of purchasers and the sale of the Bonds, defendants, for the purpose of executing their scheme, placed or caused to be placed in an authorized depository for mail matter, copies of the Official Statement and other documents to be sent or delivered by the Postal Service to prospective investors, including Abell and Walton. Further for the purpose of executing their scheme, defendants transmitted or caused to be transmitted by means of wire, and other means of interstate communication, writings, signs, signals, pictures or sounds.

* * *

68. In connection with the purchase and sale to Abell, Walton and other Bond Purchasers, defendants intentionally or by severe recklessness, directly or indirectly, employed a scheme or artifice to defraud Abell, Walton and other Bond Purchasers by conspiring to bring securities onto the market which were not entitled to be marketed; by making untrue statements of material fact or omitting to state material facts necessary to make the statements made, in light of the circumstances in which they were made, not misleading; and by engaging in acts, practices, and/or a course of business which operated as a fraud or deceit, in the respects, among others, set forth in the General Allegations, all in contravention of the provisions of

Section 10 of the Exchange Ace and Rule 10b-5 of the Securities and Exchange Commission

69. Alternatively, each defendant knew or should have known by the exercise of due diligence of the scheme or artifice to defraud Abell, Walton and the other Bond Purchasers in the purchase and sale of securities, and that his

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* * *

In order to prove a "pattern" of racketeering activity, it is not sufficient for the plaintiffs to prove only that Fryar and/or All American committed two of the racketeering acts I have just described. You also must find that the acts committed constitute a pattern of racketeering activity.

A series of disconnected acts does not constitute a pattern, and a series of disconnected crimes does not constitute a pattern of racketeering activity.

In order to prove a pattern of racketeering activity, the plaintiffs must prove, by a preponderance of the evidence, that at least two of the alleged racketeering acts were connected with one common scheme, plan or motive.

Plaintiffs are not required to prove the existence of multiple fraudulent schemes.